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In the Supreme Court of the United States

OCTOBER TERM, 1979

HENRY KISSINGER, ET AL., PETITIONERS

v.

MORTON HALPERIN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

1. Whether the President and his closest advisors, including the Attorney General, are absolutely immune from personal damages liability for decisions made in the exercise of the President's official authority.

2. Whether these federal officials are entitled to a qualified immunity as a matter of law for authorizing electronic surveillance for national security purposes prior to this Court's decision in *United States* v. *United States District Court*, 407 U.S. 297 (1972).

3. Whether the Court's decision in *United States* v. *United States District Court*, and lower court rulings amplifying that decision, should be applied retroactively to create personal damages liability for federal officers.

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*Additional petitioners are Richard Nixon, John N. Mitchell, and H.R. Haldeman. Additional respondents are Ina Halperin, David Halperin, Mark Halperin, and Gary Halperin.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–53a) is reported at 606 F.2d 1192. The opinions of the district court (Pet. App. 54a–59a, 60a–77a) are reported at 424 F. Supp. 838 and 434 F. Supp. 1193.

JURISDICTION

The judgment of the court of appeals (Pet. App. 78a–79a) was entered on July 12, 1979. On October 2, 1979, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including December 9, 1979. The petition for a writ of certiorari was filed on December 7, 1979, and was granted on May 19, 1980 (I J.A. 355). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent constitutional and statutory provisions are set out in the petition at pages 2–4.

STATEMENT

1. Between February and April of 1969, President Richard Nixon and several of his top advisors became increasingly concerned about unauthorized disclosures to the press of certain foreign policy documents and classified information. The information that was being improperly divulged revealed the internal formulation of foreign policy on several important and sensitive issues, including strategic arms limitations talks then under way with the Soviet Union, peace proposals for the Middle East, the termination of our military involvement in Vietnam, and the return of the island of Okinawa to Japanese control (I J.A. 218–222, 309–310; II J.A. 9–10, 13–14). The President and his advisors believed that the untimely release of this classified information would seriously jeopardize the gov-

ernment's foreign policy initiatives in these areas (I J.A. 310).[1] They also believed that a likely source of these leaks was personnel at the National Security Council ("NSC") because the leaked information included certain statements made during confidential discussions within that agency (I J.A. 318–321). Between February 3 and April 25, 1969, there occurred in the public press more than 16 disclosures of highly classified information either from NSC files or dealing with NSC matters (I J.A. 319–320; II J.A. 15).[2]

Accordingly, on April 25, 1969, President Nixon met with Attorney General John N. Mitchell, NSC Director Henry Kissinger, and FBI Director J. Edgar Hoover to discuss methods for controlling these breaches of security. Director Hoover informed President Nixon that electronic surveillance, including wiretaps, was an effective method of determining the source of leaks and had been used by previous administrations for similar reasons (I J.A. 223,

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[1] Administration officials were concerned that these leaks, in addition to disseminating classified information, might raise serious questions about the United States' credibility and reliability in dealing with foreign governments on a confidential basis and might serve to inhibit critical discussions and vigorous debate within the Executive Branch itself (I J.A. 220, 222; II J.A. 17, 23, 75). For example, because of the position of the Cambodian government, the continuation of bombing missions against North Vietnamese sanctuaries in Cambodia depended upon strict secrecy (II J.A. 18, 26; see also pages 3–4, *infra*). Similarly, the initiation of relations with the Peoples Republic of China also hinged on preserving the secrecy of negotiations (II J.A. 37–38).

[2] The National Security Council was originally established in 1947. After a reorganization by President Truman in 1950, the NSC was extensively used by President Eisenhower in the formulation of national defense and foreign policy. Although the Council occupied a much lesser role in the Kennedy and Johnson administrations, it returned to a position of importance under President Nixon. See S. Rep. No. 94–755, 94th Cong., 2d Sess., Book I at 42, Book VI at 244–250 (1976). President Johnson cautioned President Nixon about reviving the NSC as a major policy-making body because of a concern over the possibility of leaks (II J.A. 10–11, 82–83), and President Eisenhower, while supporting the action, also expressed serious concern regarding NSC leaks (II J.A. 13–14).

315, 325-326; II J.A. 15-17, 34, 141-142, 216).[3] Attorney General Mitchell advised the President that the use of wiretaps to discover the source of the leaks would be legal (I J.A. 223, 315, 326; II J.A. 17, 34, 62, 178-183, 190, 216).

President Nixon thereupon authorized a program of electronic surveillance and adopted three criteria to identify individuals who would be investigated: (a) access to classified material that had been leaked; (b) unfavorable information in the individual's security file; and (c) FBI investigations that listed the individual as a potential source of leaked information (I J.A. 48-49, 212-213, 326; II J.A. 16-17, 20, 45, 209-211, 218, 231-232). At the President's direction, Dr. Kissinger prepared a list of officials who had access to leaked information (I J.A. 48-49, 223, 317; II J.A. 19-20, 28, 62, 211). Morton Halperin, Chief of the NSC Planning Group, was on that list (I J.A. 223-224).[4]

Serious leaks from or pertaining to the NSC continued in late April and early May of 1969, and at least four more such leaks appeared in the news media between April 27 and May 6 (I J.A. 320; II J.A. 15). On May 9, 1969, an article was published in the *New York Times* that contained classified information concerning United States' bombing missions against North Vietnamese sanctuaries in Cambodia (I J.A. 220; II J.A. 18, 27). This disclosure of extremely sensitive information caused the leadership of Cambodia to denounce the bombing and prompted the dis-

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[3] President Johnson had previously told President Nixon that he had employed wiretaps in national-security cases and considered their use to be legal (II J.A. 34). See S. Rep. No. 94-755, *supra*, Book III at 321-323; see also *id.* at 328-330.

[4] In this capacity, Dr. Halperin had access to highly confidential information on major policy issues during this period. Among other things, Halperin attended NSC Review Group meetings on such subjects as the United States' strategic posture, the SALT negotiations, and the war in Vietnam, and received various confidential intelligence reports and limited distribution cables on the war in Vietnam and the Paris peace negotiations (I J.A. 223-224).

continuance of that military operation (II J.A. 18–19, 26–27).[5] At the President's request, Dr. Kissinger called Director Hoover and asked him to investigate the source of the security leak (I J.A. 170, 336–337; II J.A. 19, 27, 218–219). Several hours later, Hoover called Kissinger to inform him that Halperin was a likely source (I J.A. 171–175; II J.A. 222–223, 227–228), and a wiretap was installed on Halperin's home telephone that evening (I J.A. 46, 61, 82–83).[6] Acting pursuant to the President's authorization, Attorney General Mitchell formally approved the wiretap on May 12, 1969 (I J.A. 82–83, 175–177; II J.A. 159–160).

In authorizing the surveillance, President Nixon indicated that the wiretaps should be limited to those circumstances that truly involved the national security and required the use of electronic surveillance (II J.A. 17, 19, 21, 23, 44, 45, 49, 58) and that the wiretaps should be terminated as soon as they were no longer necessary (I J.A. 182; II J.A. 44, 45, 58, 92). Neither the President nor the Attorney General believed it necessary to give specific instructions concerning the actual operation of the investigation; such matters of detail were left to Director Hoover as the expert in the area, and they presumed that he would observe all applicable Department of Justice procedures (II J.A. 28–29, 42–44, 48–49, 61–63, 134, 183–184).[7] Petitioners Kissinger and Haldeman also assumed that the FBI would comply with established legal requirements (II J.A. 213, 269–271, 304).

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[5] This leak was of particular concern because the information disclosed in the article had been held on a strict need-to-know basis and had not yet even been discussed at an open NSC meeting (II J.A. 19).

[6] Dr. Halperin was selected for surveillance on the grounds that Director Hoover had identified Halperin at the April 25 meeting as having unfavorable information in his security file, that Dr. Kissinger had included Halperin's name on the list of key NSC personnel with access to leaked information, and that Hoover had advised Kissinger on May 9 that a preliminary investigation showed Halperin to be a principal suspect regarding the leaks (I J.A. 172–175, 223–224, 326, 327; II J.A. 120, 210–211, 214, 216–218, 222–223, 228, 230–231).

[7] On May 6, 1969, Attorney General Mitchell had promulgated procedures to be observed by the Department of Justice in cases of war-

Because the success of the investigation depended on secrecy, and because disclosure would have had a detrimental effect on the morale of those working in the new administration and on relations with foreign governments (II J.A. 17, 23), the President directed that the investigation be "closely held" (II J.A. 43). In accordance with this direction, Director Hoover decided that only one master copy of the surveillance logs would be maintained and that surveillance materials would not be kept in the general files of the FBI (Sullivan Dep. 42–43). Summaries of information obtained through the investigation were prepared and sent to the White House for the President and Dr. Kissinger (I J.A. 225; Sullivan Dep. 42–43; Haig Dep. 41–43).[8] On occasion, copies of the summaries were also sent to the Department of Justice for Attorney General Mitchell (I J.A. 249, 264; II J.A. 162). The summaries were generally handled by the staff in these offices and only rarely, if ever, were they read personally by the President, the Attorney General, or the NSC Director (II J.A. 50–53, 84, 100, 162–164, 166–167, 170–171, 213, 238, 246–247, 248–249). In May 1970, this system of distribution was modified to have the summaries sent to H.R. Haldeman, Assistant to the President, who would bring pertinent information to the attention of the President and

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rantless national-security wiretaps. The Attorney General's directive provided that initial and renewal applications for such wiretaps contain specified information justifying the surveillance and that extensions beyond 90 days be approved in writing by the Attorney General (Pet. App. 7a n.22, 68a–69a n.6; I J.A. 161–164; II J.A. 133–138). Compare *Warrantless Wiretapping and Electronic Surveillance—1974: Joint Hearings Before the Subcomm. on Administrative Practice and Procedure and the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary and the Subcomm. on Surveillance of the Senate Comm. on Foreign Relations*, 93d Cong., 2d Sess. 70 (1974) (statement of former Attorney General Ramsey Clark) (quarterly accounting of electronic surveillance but no renewal requirement).

[8] Initially, these summaries were reviewed by Dr. Kissinger's aide, General Alexander Haig, at the office of Assistant FBI Director William C. Sullivan (Haig Dep. 17–23; Sullivan Dep. 53–54). Beginning on May 28, 1969, the summaries were distributed to the White House.

Dr. Kissinger (I J.A. 225, 232, 251, 264, 343-344; II J.A. 78-79, 295-296).[9]

Despite the administration's efforts to maintain the integrity of confidential information, the problem of leaks persisted throughout the period 1969-1971, with "serious adverse effects upon our national security and our relations with our allies" (I J.A. 224-225).[10] While the wiretaps continued, Dr. Halperin resigned his full-time position with the National Security Council in September 1969 and his position as a consultant to the NSC in May 1970 (I J.A. 223; II J.A. 85).[11] Because the continuing surveillance failed to reveal that Halperin was the source of the leaks, the wiretap was removed from his phone on February 10, 1971 (I J.A. 211).

2. The existence of this wiretap was disclosed during the trial of Daniel Ellsberg in May 1973 (I J.A. 48). After learning of the wiretap, Dr. Halperin and his wife and children (the respondents) filed this action in the United States District Court for the District of Columbia, alleging that the wiretap was unlawful under the Fourth Amend-

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[9] This change in distribution resulted from Director Hoover's view that the summaries were available to too many people and from Dr. Kissinger's request that the summaries no longer be sent to his office in light of his increasing workload as National Security Advisor and his need to deal on a daily basis with those who were under surveillance (II J.A. 78-79, 295-296). Haldeman was selected to receive the summaries and coordinate the information because, as the President's closest aide, "he was totally privy to all of [the administration's] major foreign policy issues" (II J.A. 79).

[10] In October 1969 (I J.A. 190-191) and December 1970 (I J.A. 207-208), the President issued memoranda to Cabinet officers and other ranking administration officials regarding the problem of leaks and the necessity to curb such unauthorized disclosures of confidential information.

[11] When Dr. Halperin left the NSC, he removed, without approval, several boxes of highly classified and sensitive NSC studies and memoranda, including materials entitled "Strategic Arms Limitations Talks, Basic Book," "Strategic Missile Talks," "Vietnam Negotiations," "Vietnam Options 1969," "Vietnam Bombing," and "Major Security Issues" (I J.A. 307). And, of course, Halperin did not expunge from his memory the confidential information he had learned while employed at the NSC (II J.A. 91).

ment and Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510 *et seq.* The suit was brought against petitioners and other federal officers[12] and sought monetary damages and declaratory and injunctive relief.

After extensive discovery (Pet. App. 28a n.85, 65a, 70a),[13] the district court granted petitioners' motion for summary judgment on the Title III claims. The court stated that "[i]nterpretation of this statute and of the President's domestic power thereunder" was entirely unsettled prior to *United States* v. *United States District Court*, 407 U.S. 297 (1972), and that petitioners "should not be held to have acted at their peril in this vacuum," especially in light of "the 30-year history of similar Executive actions" (Pet. App. 66a). The court thus held that

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[12] In addition to petitioners Kissinger, Nixon, Mitchell, and Haldeman, the complaint sought damages from defendants John Ehrlichman, Alexander Haig, William Sullivan, Robert Mardian, Jeb Stuart Magruder, and the Chesapeake and Potomac Telephone Company; FBI Director Kelley was also named as a defendant for purposes of equitable remedies. The district court granted summary judgment in favor of the defendants against whom monetary relief was sought (Pet. App. 74a–77a). The district court also awarded summary judgment to Kissinger because of his "inactive role [in the wiretap] and the lack of oversight authority" (*id.* at 75a).

[13] Respondents engaged in voluminous discovery in this case. They took 22 depositions totalling more than 1,900 pages and were given broad access to a great many documents, including petitioners' personal logs and appointment books, internal government memoranda concerning both the Halperin wiretap and the general policies and procedures for electronic surveillance, and White House tapes. Respondents also had available the information developed during several congressional investigations relevant to this wiretap. See *Final Report of the Senate Select Committee to Study Governmental Operations With Respect to Intelligence Activities*, S. Rep. No. 94–755, 94th Cong., 2d Sess. (1976) (Church Committee); *Dr. Kissinger's Role in the Wiretapping of Certain Government Officials and Newsmen: Hearings Before the Senate Comm. on Foreign Relations*, 93d Cong., 2d Sess. (1974); *Statement of Information, Committee on the Judiciary of the House of Representatives*, 93d Cong., 2d Sess. (1974); H.R. Rep. No. 93–1305, 93d Cong., 2d Sess. 146–150 (1974) (Judiciary Committee report on evidence from impeachment inquiry into wiretap program). See also Pet. App. 70a–72a nn.7–12.

petitioners had a "reasonable" and "good faith belief" that "Title III was inapplicable to the Halperin wiretap" and that "[respondents] have no cause of action under Title III" (*id.* at 66a–67a).

With respect to respondents' constitutional claims, however, the district court concluded that the wiretap constituted an unreasonable search in violation of the Fourth Amendment. The court recognized that "[t]here was justifiably grave concern in early 1969 over the leaking of confidential foreign policy information," that such leaks "could reasonably be viewed as impeding progress and affecting policy-makers' discussions in [several] areas [of foreign policy]," and that, as "determined by the highest Executive officials * * * [pursuant to] [s]pecific criteria[,] * * * [a] limited number of persons were subjected to * * * electronic surveillance, many for a relatively short time" (Pet. App. 68a). Nevertheless, it held that, "even granting the inapplicability of the general warrant requirement," the wiretap of respondents' telephone was constitutionally unreasonable because it continued for 21 months without an effort to minimize the number or type of conversations overheard (*id.* at 68a–70a). On this basis, the court imposed liability upon "former President Nixon, for having initiated and overseen the program without any temporal or informational limits on the surveillance; Attorney General Mitchell, for having failed to carry out review and renewal obligations during the entire twenty-one month surveillance period; [and] H.R. Haldeman, for having reviewed the wiretap material for over a year without recommending termination and for having disseminated the material for purposes unrelated to the tap's original justification" (*id.* at 73a).

The district court also determined that the President, the Attorney General, and the other petitioners were not entitled to an absolute immunity from damages liability for authorizing an electronic surveillance in violation of the Fourth Amendment (Pet. App. 70a & n.8, 73a). Furthermore, although it found that petitioners' conduct "cannot fairly be characterized as a wanton, reckless or malicious disregard of [respondents'] rights" (*id.* at 56a),

the court held that petitioners were not entitled to a qualified good-faith immunity from damages liability because "their activities relating to the wiretap continuance [were] unreasonable and in violation of established Fourth Amendment rights" (*id.* at 73a) and because they "are charged with knowledge of established law" (*id.* at 74a). Since respondents did not establish any actual injury from the wiretap, however, the court awarded only nominal damages of one dollar (*id.* at 56a).[14]

3. The court of appeals reversed the judgment of the district court and remanded for further proceedings. Relying on its decision in the companion case of *Zweibon* v. *Mitchell*, 606 F.2d 1172 (D.C. Cir. 1979), petitions for cert. pending, Nos. 79-881, 79-883 (filed Dec. 7, 1979), the court held that the Fourth Amendment requirement of a warrant for electronic surveillance in national-security cases would be applied retroactively to establish a cause of action in damages (Pet. App. 30a). In addition, the court concluded that petitioners' failure to terminate the surveillance within a reasonable period of time constituted a violation of the Fourth Amendment that also gave rise to a damages action (*id.* at 29a-32a). Finally, the court of appeals agreed with the district court that (i) the President and his closest advisors (including the Attorney General) are not entitled to absolute immunity with respect to their authorization and implementation of the surveillance, and (ii) petitioners are not entitled to qualified immunity as a matter of law with respect to the continuation of the surveillance because "there were no reasonable grounds for believing that the continuing surveillance was in accord with the Constitution" (*id.* at 41a).[15] The court remanded

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[14]The district court also ordered petitioners to insert certain exonerating materials into respondent Morton Halperin's security file and enjoined petitioners from making any use of the intercepted communications (Pet. App. 57a-59a). These portions of the court's judgment were not appealed, and therefore the only remaining issues in this case concern petitioners' personal liability for money damages.

[15]The court of appeals also suggested that the district court had found that the wiretap was continued in bad faith (Pet. App. 41a). As discussed below (pages 60-61, *infra*), however, we believe that the district court made no such finding.

the case to the district court to determine when the continuation of the wiretap became unreasonable and whether petitioners acted in good faith in authorizing a warrantless electronic surveillance for national security purposes prior to this Court's decision in *United States* v. *United States District Court*, *supra* (*id.* at 29a, 31a).[16]

SUMMARY OF ARGUMENT

I.

A.

The courts below have held, for the first time since the founding of the Republic, that the President of the United States is subject to personal damages liability for official acts taken in his capacity as the Nation's Chief Executive. This unprecedented ruling is contrary to both the historical understanding of the absolute immunity inherent in the Office of the President under Article II of the Constitution and the compelling reasons of public policy in favor of such a privilege for the President. In light of the principle of separation of powers and the "special functions" of the

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[16] In addition, the court of appeals remanded respondents' statutory claims for a determination whether, as respondents asserted, the primary purpose of the surveillance was not to "protect[ ] national security information against foreign intelligence activities" (Pet. App. 28a). The court held that if some other purpose primarily was intended, petitioners' failure to obtain a warrant would subject them to damages liability under Title III (18 U.S.C. 2511, 2520) (Pet. App. 27a–28a). We have not sought review of this portion of the court of appeals' judgment because we believe that the district court already has determined that the primary purpose of the surveillance was the protection of national security information (*id.* at 61a–62a, 68a) and that any proceedings on remand would support that ruling.

The court of appeals also held that respondents should be awarded more than nominal damages if they can establish emotional distress or other intangible injury (Pet. App. 33a–35a). Finally, the court of appeals reversed the award of summary judgment in favor of Dr. Kissinger, holding that there were genuine issues of material fact concerning his role in the installation and maintenance of the wiretap (*id.* at 49a–50a). We have not sought review of these issues.

presidency (*Butz* v. *Economou*, 438 U.S. 478, 508 (1978)), an absolute immunity is necessary "to protect the decisionmaking processes of [the President]" (*id.* at 503) and "is essential for the conduct of the public business" (*id.* at 507). Accordingly, this Court should reject the lower courts' unwarranted assertion of judicial authority in personal damages suits to engage in routine oversight of the President's official acts.

It has long been recognized that the President is not personally accountable in judicial proceedings for the exercise of his executive powers. The Framers of the Constitution, after extensive consideration focusing specifically on the Office of the President, concluded that possible excesses of presidential authority would be restrained by the power of impeachment, the political constraints of the election process and public opinion, and the system of checks and balances. Nothing in their deliberations suggested in any way that the President would be liable to suit for money damages arising out of the conduct of his Office.

In line with these authorities, few litigants have ever attempted to sue the President for monetary relief. And, on those infrequent occasions when such litigation has been commenced, the federal courts have consistently ruled that the President cannot be held personally accountable for damages.

The doctrine that the President is absolutely immune from personal damages liability for his official acts also rests on sound reasons of public policy and serves to ensure the fundamental separation of governmental powers. Most importantly, the risk of personal liability would inhibit the fearless and decisive exercise of presidential authority, and "the public trust [placed in the President] would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages." *Imbler* v. *Pachtman*, 424 U.S. 409, 424–425 (1976). As the Nation's Chief Executive, the President is repeatedly called upon to make discretionary decisions on controversial issues that affect the lives of virtually every American. Especially in the critical

areas of national defense and foreign affairs, the President's discharge of these "grave, complex and unique responsibilities" (Pet. App. 53a (Gesell, J., concurring)) should be motivated solely by considerations of the public welfare, not by fear of damages awards.

Moreover, the President is a natural target for those dissatisfied by the outcome of his decisions. The matters that come to the attention of the President are likely to "arouse the most intense feelings" (*Butz* v. *Economou*, *supra*, 438 U.S. at 509 n.36), and it is all too easy for disgruntled individuals or groups, simply by alleging an "unconstitutional animus" (*id.* at 512), to carry their disagreement from the political arena into the courtroom.

Finally, successful damages suits against the President would be quite rare, and there exist means wholly apart from such litigation—the power of impeachment and the availability of subsequent criminal prosecution, the system of checks and balances, the electoral process and the force of public opinion, and the availability of judicial review of executive actions—to deter the improper exercise of presidential authority. These considerations have special bearing with respect to the President, in light of the express constitutional delegation to him of the full "executive Power * * * of the United States" (Art. II, § 1), the prominence and visibility of his Office, his status as the only elected official in the Executive Branch of the federal government, and his traditional role as the leader of his political party.

By the same token, it is evident that a qualified immunity would be seriously inadequate to protect the "public interest * * * [in the] vigorous and fearless performance of the * * * [President's] duty." *Imbler* v. *Pachtman*, *supra*, 424 U.S. at 427. A qualified presidential privilege would lead to an extreme and unwarranted interference with the decision-making process of the Executive Branch and the execution of presidential duties by requiring the President to explain and justify his decisions in response to civil damages suits. Indeed, in order to sustain his claim of qualified immunity, the President would generally be

forced to reveal not only the intimate details of constitutionally privileged executive decision-making (*United States* v. *Nixon*, 418 U.S. 683 (1974)), but also the confidential and often highly sensitive information on which he based his acts. It may also be impossible to convey to a lay jury several years later, in the aftermath of subsequent national events and possible political passions, the complexity, gravity, and urgency of controversial presidential decisions—especially decisions (as in this case) in the areas of national security and foreign affairs. Finally, the burdens of such litigation—the time, the expense, the personal anxiety, and the unavoidable distraction from offical duties—should not be imposed upon the President.

B.

Absolute presidential immunity should extend to those who act on the President's behalf at his direction. The responsibilities of the presidency are extraordinarily numerous, complex, and far-reaching. Of necessity, therefore, the President must delegate to others many of the tasks and functions relating to his Office. "[T]he day-to-day work of such aides is so critical to the * * * [President's] performance that they must be treated as the latter's alter egos; and * * * if they are not so recognized, the central role of the * * * [absolute presidential immunity] will inevitably be diminished and frustrated." *Gravel* v. *United States*, 408 U.S. 606, 616–617 (1972). Thus, "for the purpose of construing the privilege * * * [the President] and his aide[s] are to be 'treated as one' " (*id.* at 616), so that the absolute presidential immunity "applies not only to * * * [the President] but also to his aides insofar as the conduct of the latter would be a protected * * * act if performed by the * * * [President] himself" (*id.* at 618).

Because petitioners Kissinger, Mitchell, and Haldeman were "operating under [President Nixon's] specific authority and were carrying out [his] express orders" (I J.A. 48–49), they are accordingly entitled to a derivative absolute immunity in this case.

C.

Petitioners Kissinger, Mitchell, and Haldeman are entitled to absolute immunity from liability based on advice they gave the President on matters within their respective areas of official responsibility. Under the Constitution (Art. II, § 2), the President is authorized to require the opinion of his closest aides and advisors on matters of public policy. The spectre of personal damages liability would unduly interfere with the President's authority to obtain the views and recommendations of high-ranking executive officers. Moreover, this exchange between the President and his subordinates is protected by a constitutional privilege that is "inextricably rooted in the separation of powers." *United States* v. *Nixon*, *supra*, 418 U.S. at 708. A qualified immunity would be inadequate to secure these constitutional principles and would deter the expression of "candid, objective, and even blunt or harsh opinions in Presidential decisionmaking" (*id.* at 708). In light of the "special nature of their responsibilities" as presidential advisors (*Butz* v. *Economou*, *supra*, 438 U.S. at 511), petitioners Kissinger, Mitchell, and Haldeman should be absolutely immune from civil damages actions arising out of their advice to the President.

II.

Petitioners are also entitled to qualified immunity as a matter of law. The doctrine of qualified immunity is premised on the belief that "it is not unfair to hold liable the official who knows or should know he is acting outside the law, and that insisting on an awareness of clearly established constitutional limits will not unduly interfere with the exercise of official judgment." *Butz* v. *Economou*, *supra*, 438 U.S. at 506–507. The Court's decisions have "emphasized * * * that, at least in the absence of some showing of malice, an official would not be held liable in damages * * * unless the constitutional right he was alleged to have violated was 'clearly established' at the time of the violation" (*id.* at 498). In *Procunier* v. *Navarette*, 434 U.S. 555 (1978), the Court applied these principles to hold that "since the constitutional right al-

legedly violated had not been authoritatively declared at the time the * * * officials acted, the officials were entitled, as a matter of law, to prevail on their claim of qualified immunity." *Baker* v. *McCollan*, 443 U.S. 137, 139 (1979).

In the circumstances of this case, it is clear that the alleged constitutional violations did not involve "settled, indisputable law" or "basic, unquestioned constitutional rights." *Wood* v. *Strickland*, 420 U.S. 308, 321, 322 (1975). At the time the Halperin wiretap was in operation, the constitutional standards pertaining to national-security surveillance were, at the least, unsettled. The Court had first held the Fourth Amendment to be applicable to wiretaps at all only two years before the Halperin wiretap was installed in May of 1969, and its subsequent opinions recognized the separate and unresolved status of national-security wiretaps. Indeed, several lower federal courts prior to 1972 had upheld the government's longstanding view of the President's authority to conduct warrantless surveillance in national-security cases, and no contrary decisions were rendered until the final month of the Halperin wiretap. In view of the development of the law in this area, it can scarcely be doubted that, at a minimum, the constitutional standards alleged to have been violated here were not "clearly established" during the period of the wiretap.

Moreover, the court of appeals erred in suggesting that petitioners were not entitled to qualified immunity as a matter of law because the district court found that the Halperin wiretap had been continued in "bad faith" (Pet. App. 41a). The district court made no such finding. To the contrary, the court concluded that petitioners' conduct "cannot fairly be characterized as a wanton, reckless or malicious disregard of [respondents'] rights" (*id.* at 56a). It rejected petitioners' qualified-immunity defense solely on the ground that, "[r]egardless of intention, they violated [respondents'] basic constitutional right * * * [and] are charged with knowledge of established law" (*id.* at 74a).

More importantly, the precise limits of the doctrine of qualified immunity are not indentical for all officials, but vary "dependent upon the scope of discretion and responsibilities of the office." *Scheuer* v. *Rhodes*, 416 U.S. 232, 247 (1974). The scope of discretion and breadth of responsibility entrusted to the President, and to the advisors who assist and act for him, differ markedly from those of federal officials generally. The same reasons that support an absolute presidential immunity also indicate that, if the immunity is only qualified, these officials should not be required to disprove allegations of "malice" in personal damages actions. Such a qualified-immunity doctrine would impose a judicial check on intentional misconduct where the law is clearly established, but would avoid the burdens of a lengthy and disruptive hearing on allegations of malice that, as the court of appeals acknowledged, are easily made (Pet. App. 47a) but rarely sustainable (*id.* at 45a).

III.

The judicial decisions establishing constitutional standards for national-security surveillance, which were announced after the Halperin wiretap had been terminated, should not be applied retroactively to create personal damages liability for federal officers. See *Weinberg* v. *Mitchell*, 588 F.2d 275 (9th Cir. 1978).

First, as discussed above, the principles governing national-security surveillance were, at the least, unsettled at the time of the Halperin wiretap. Thus, these subsequent decisions "establish[ed] a new principle of law * * * by deciding an issue of first impression whose resolution was not clearly foreshadowed * * *." *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106 (1971). Moreover, these decisions were designed to avoid "potential invasions of privacy and protected speech * * * [and to provide] reassurance of the public generally that indiscriminate wiretapping and bugging of law-abiding citizens cannot occur." *United States* v. *United States District Court*, 407 U.S. 297, 317, 321 (1972). Since these decisions "look[] to a *future* free from such surveillance" (*Weinberg* v. *Mitchell*, *supra*, 588 F.2d at

278; emphasis added), retroactive application would not further their preventive purpose (see *Chevron Oil Co.* v. *Huson, supra*, 404 U.S. at 107).

Finally, it would be seriously inequitable to subject petitioners, by means of a retroactive application of the law, to personal damages liability for failing to conform their acts to constitutional guidelines that did not then exist (see *Chevron Oil Co.* v. *Huson, supra*, 404 U.S. at 107). "[T]he notion that persons have a right to fair warning of that conduct that will give rise to * * * [liability] is fundamental to our concept of constitutional liberty." *Marks* v. *United States*, 430 U.S. 188, 191-192 (1977). To create retroactively a constitutional tort action and hold petitioners personally liable for conduct that was not wrongful at the time, as the court below has done, "would be as inequitable as *ex post facto* criminal liability * * * [and] would be nothing short of punitive." *Weinberg* v. *Mitchell, supra*, 588 F.2d at 278.

ARGUMENT

I. THE PRESIDENT AND HIS CLOSEST ADVISORS ARE ABSOLUTELY IMMUNE FROM PERSONAL DAMAGES LIABILITY FOR DECISIONS MADE IN THE EXERCISE OF THE PRESIDENT'S OFFICIAL AUTHORITY

The courts below in this case have held, for the first time in the history of the Republic, that the President of the United States is subject to personal damages liability for official acts taken in his capacity as the Nation's Chief Executive. This unprecedented ruling is contrary to both the historical understanding of the absolute immunity inherent in the Office of the President under Article II of the Constitution and the compelling reasons of public policy in favor of such a privilege for the President. In light of the general analysis of immunity issues established by this Court and the fundamental principle of separation of powers, these considerations require reversal of the lower courts' unwarranted assertion of judicial authority in per-

sonal damages actions to engage in routine oversight of the President's official conduct.[17]

A. The President Of The United States Is Absolutely Immune From Civil Damages Liability Based On The Conduct Of His Office

The President of the United States is entitled to absolute immunity from damages liability arising out of his official acts. As the head of the Executive Branch of the federal government, the President, like the constitutional officers of the Legislative and Judicial Branches,[18] must be free both of the fear of personal liability and of undue interference by coordinate parts of the government. Absolute immunity is necessary to enable the President to discharge his Article II duties without regard to factors other than the best interests of the Nation and the dictates of his solemn oath of Office.[19]

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[17] In our view, this absolute immunity is fully applicable to a former President who is sued in a personal damages action for his official conduct while in office. See *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 448–449 (1977); *Bohmer* v. *Nixon*, Civil No. 75–4–T (S.D. Cal. June 16, 1976) (I J.A. 126); *Fonda* v. *Nixon*, Civil No. 73–2442–MML (C.D. Cal. May 23, 1974) (I J.A. 112); see also Pet. App. 53a (Gesell, J., concurring).

[18] See, *e.g.*, *Supreme Court of Virginia* v. *Consumers Union of the United States, Inc.*, No. 79–198 (June 2, 1980); *Butz* v. *Economou*, 438 U.S. 478, 508–512 (1978); *Stump* v. *Sparkman*, 435 U.S. 349 (1978); *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491 (1975).

[19] As this Court has recognized, absolute immunity for government officials is supported by the principle of separation of powers, since it helps "'to preserve the constitutional structure of separate, coequal, and independent branches of government * * *.'" *United States* v. *Gillock*, No. 78–1455 (Mar. 19, 1980), slip op. 9, quoting *United States* v. *Helstoski*, 442 U.S. 477, 491 (1979). "'In the American governmental structure * * * [this absolute immunity] serves the * * * function of reinforcing the separation of powers so deliberately established by the Founders.'" *Davis* v. *Passman*, 442 U.S. 228, 235 n.11 (1979), quoting *United States* v. *Johnson*, 383 U.S. 169, 178 (1966). See also *Sinking-Fund Cases*, 99 U.S. 700, 718 (1878) ("One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict

The President must also be accorded an absolute immunity under the official immunity analysis established in this Court's precedents. In *Butz* v. *Economou*, 438 U.S. 478 (1978), the Court, recognizing "that the law of privilege as a defense to damages actions against officers of Government has 'in large part been of judicial making' " (*id.* at 501–502, quoting *Doe* v. *McMillan*, 412 U.S. 306, 318 (1973), and *Barr* v. *Matteo*, 360 U.S. 564, 569 (1959)), set forth the following standard to govern the resolution of immunity issues (438 U.S. at 503, 506, 507, 508; footnote omitted):

> Having determined that the plaintiff is entitled to a remedy in damages for a constitutional violation, the court then must address how best to reconcile the plaintiff's right to compensation with the need to protect the decisionmaking processes of an executive department. * * *
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> [F]ederal officials who seek absolute exemption from personal liability for unconstitutional conduct must bear the burden of showing that public policy requires an exemption of that scope * * * [and] that absolute immunity is essential for the conduct of the public business.
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> Although a qualified immunity from damages liability should be the general rule for executive officials charged with constitutional violations * * * there are some officials whose special functions require a full exemption from liability. * * * In each case, we have undertaken "a considered inquiry into the immunity

observance of this salutary rule"). And the possibility that presidential actions may be "'subject to judicial review in various circumstances'" does not suggest that such actions "'may * * * be made the basis for a civil * * * judgment against * * * [the President].'" *Doe* v. *McMillan*, 412 U.S. 306, 311–312 (1973), quoting *Gravel* v. *United States*, 408 U.S. 606, 624 (1972).

We note that, in the present case, the President was exercising his powers conferred by Article II of the Constitution in the critical areas of national defense and foreign affairs. See pages 37–38, *infra*; cf. *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 166 (1803).

> historically accorded the relevant official at common law and the interests behind it." [*Imbler* v. *Pachtman*, 424 U.S.] at 421.

The "special functions" of the presidency clearly call for a full exemption from liability for the President of the United States.

1. It has long been recognized that the President, in whom "[t]he executive Power [is] vested" (Art. II, § 1), is not personally accountable in judicial proceedings for the exercise of his executive powers. At the time of the First Congress, Vice President John Adams and Senator Oliver Ellsworth of Connecticut (who had been a member of the Constitutional Convention and later became Chief Justice of the United States) explained that no action could be instituted personally against the President because any such judicial authority would permit a single judge or court to "stop the whole machine of government." W. Maclay, *Sketches of Debate in the First Senate of the United States* 151-152 (Harris ed. 1880). Nor did they believe that this presidential immunity placed the "President * * * above the laws," since he was liable to impeachment; however, "you could only impeach him, and no other process whatever lay against him" (*id.* at 152). Similarly, as Mr. Justice Story later concluded:

> There are * * * incidental powers, belonging to the executive department, which are necessarily implied from the nature of the functions, which are confided to it. Among these, must necessarily be included the power to perform them, without any obstruction or impediment whatsoever. The president cannot, therefore, be liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office; and for this purpose *his person must be deemed, in civil cases at least, to possess an official inviolability. In the exercise of his political powers he is to use his own discretion, and is accountable only to his country, and to his own conscience.* His decision, in relation to these powers, is subject to no control; and his discretion, when exercised, is conclusive.

III J. Story, *Commentaries on the Constitution of the United States* § 1563, at 418-419 (1833 ed.) (emphasis added).

The drafters of the Constitution were well aware of the potential for the new government to abuse the powers conferred upon it. They were also cognizant that the President, unlike the King of England, was not to be "above Justice" (II M. Farrand, *The Records of the Federal Convention of 1787*, at 65 (rev. ed. 1966) (remarks of George Mason)), that "the maxim would never be adopted here that the chief Magistrate could do no wrong" (*id.* at 66) (remarks of Elbridge Gerry), and that "some provision should be made for defending the Community ag[ain]st the incapacity, negligence or perfidy of the chief Magistrate" (*id.* at 65) (remarks of James Madison).[20] But, while the Framers acknowledged that "[t]his Magistrate is not the King * * * [t]he people are the King," they also recognized that "[w]hen we make him amenable to Justice however we should take care to provide some mode that will not make him dependent on the [other branches of government]" (*id.* at 69) (remarks of Gouverneur Morris).[21]

In the Framers' view, the power of impeachment and the political check of the election process would serve to restrain misfeasance in the exercise of presidential authority. For example, as Elbridge Gerry observed, "[a] good magistrate will not fear [impeachments]. A bad one ought to be kept in fear of them" (*id.* at 66). And Rufus King noted that the President "would periodically be tried for his behaviour by his electors, who would continue or discontinue him in trust according to the manner in which he had discharged it. * * * [T]he periodical responsibility to the electors" would assure his proper conduct of office (*id.* at 67–68). Alexander Hamilton summarized these principles by stating that "the two greatest securities [the people] can have for the faithful exercise of any delegated power [are], *first*, the restraints of public opinion * * *; and, *secondly*, the opportunity of discovering with facility

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[20] See also *The Federalist* No. 69 (A. Hamilton) at 41, 47 (1914 ed.); *The Federalist* No. 70 (A. Hamilton) at 55–56 (1914 ed.).

[21] See also *The Federalist* No. 71 (A. Hamilton) at 61 (1914 ed.) ("It is one thing to be subordinate to the laws, and another to be dependent on the [other branches of government]").

and clearness the misconduct of the persons they trust, in order either to their removal from office or to their actual punishment in cases which admit of it. * * * '[T]he executive power is * * * confined * * *' [by] the jealousy and watchfulness of the people * * *." *The Federalist* No. 70 (A. Hamilton) at 55, 56-57 (1914 ed.). See also the comments of James Wilson, a delegate to the Constitutional Convention and later a Justice of this Court:

> To [the President] the provident or improvident use of [power] is to be ascribed. For the first, he will have and deserve undivided applause. For the last, he will be subjected to censure; if necessary, to punishment. He is the dignified, but accountable magistrate of a free and great people. * * * [B]y continuing to be the man of the people, his investiture will be voluntarily, and cheerfully, and honorably renewed.
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> * * * * *
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> The doctrine of impeachments is of high import in the constitutions of free states. On one hand, the most powerful magistrates should be amenable to the law: on the other hand, elevated characters should not be sacrificed merely on account of their elevation. * * *

I *The Works of James Wilson* 400 (Andrews ed. 1896); II *The Works of James Wilson*, *supra*, at 45.[22]

In addition to these constraints of impeachment, reelection, and public opinion, the Founding Fathers also erected a system of checks and balances to avert the ille-

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[22] As Wilson stated in the Pennsylvania Convention on the adoption of the Constitution:

> The executive power is better to be trusted when it has no screen. Sir, we have a responsibility in the person of our President; he cannot act improperly, and hide either his negligence or inattention; he cannot roll upon any other person the weight of his criminality * * *. Add to all this, that office is placed high, and is possessed of power far from being contemptible, yet not a single privilege is annexed to his character; far from being above the laws, he is amenable to them in his private character as a citizen, and in his public character by impeachment.

II J. Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 480 (1836) (emphasis omitted).

gitimate exercise of presidential powers. In many of the most significant regards—the veto power (Art. I, § 7), the defense and war powers (Art. I, § 8; Art. II, § 2), the treaty power (Art. II, § 2), and the appointment power (*ibid.*)—the President and the Congress enjoy shared responsibilities. Through this device, the Constitution serves directly to forestall the wrongful use of the authority of the President. "It is far more wise to interpose checks upon the actual exercise of the power, than remedies to redress, or punish an abuse of it." III J. Story, *supra*, § 1509, at 362.

This constitutional plan—to prevent presidential abuses by means of checks and balances and to deter and punish such abuses through impeachment, the electoral process, and public opprobrium—was fully explained by Hamilton in his concluding discussion of the Executive in *The Federalist:*

> Does it [the structure and power of the executive department] also combine the requisites to safety, in a republican sense,—a due dependence on the people, a due responsibility? The answer to this question has been anticipated in the investigation of its other characteristics, and is satisfactorily deducible from these circumstances; from the election of the President once in four years by persons immediately chosen by the people for that purpose; and from his being at all times liable to impeachment, trial, dismission from office, incapacity to serve in any other, and to forfeiture of life and estate by subsequent prosecution in the common course of law. But these precautions, great as they are, are not the only ones which the plan of the convention has provided in favor of the public security. In the only instances in which the abuse of the executive authority was materially to be feared, the Chief Magistrate of the United States would, by that plan, be subjected to the control of a branch of the legislative body. What more could be desired by an enlightened and reasonable people?

The Federalist No. 77 (A. Hamilton) at 97 (1914 ed.). Nothing in the entire course of these deliberations suggests in any way that the President was also to be

liable to suit for money damages arising out of the conduct of his Office. In light of the extensive consideration given to the issue of potential presidential misconduct and the settled doctrine in England that the King was not subject to judicial proceedings, it is inconceivable that the Framers intended by their silence to assent to personal damages actions against the President based on the exercise of his official duties. Rather, the manifest inference, in line with the conclusions of Vice President Adams and Senator Ellsworth in the First Senate, and of Mr. Justice Story, is that the Constitution does not sanction such suits.[23]

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[23] As historical support for its conclusion that "[t]he constitutional scheme betrays no indication that any kind of immunity was intended for the President" (Pet. App. 42a) and that the President is therefore amenable to personal damages actions for his official conduct, the court of appeals (*id.* at 42a–43a n.129) relied almost exclusively on various statements made by Charles Pinckney. However, in citing Pinckney for the assertion that "[n]o privilege of this kind was intended for your Executive * * *[,]" the court of appeals misconstrued Pinckney's remarks.

In February 1800, a newspaper in Philadelphia published an article about a bill pending in the Senate. Some Senators objected to the story, and a motion was introduced to have the Committee of Privileges inquire into its source. 10 Annals of Cong. 63, 68 (1800). Pinckney opposed the motion, stating that there is not "a word or a sentence in the whole [of the Constitution] that can by any possible construction be made to mean that for any libels or printed attack on the public conduct or opinions of either House of Congress, or of any of its members, that their privilege shall extend to ordering the persons charged with the offence before them, and imprisoning them at their will" (*id.* at 71; see also *id.* at 72). In aid of his position, Pinckney argued that the sedition statute, which made it a criminal offense to libel the President or either House of Congress, would have been unnecessary if Congress possessed the asserted power. In this connection, Pinckney noted, in the passage selectively quoted by the court of appeals (*id.* at 74; emphasis added):

> [L]et us inquire, why the Constitution should have been so attentive to each branch of Congress, so jealous of their privileges, and have shewn so little to the President of the United States in this respect. Why should the individual members of either branch, or either branch itself, have more privileges than him? He is himself, as far as his qualified negative goes, a branch of the Legislature; he is, besides, your Executive, he is the sword

2. In view of these authorities, the absence of personal damages actions against the President for his official conduct is not surprising. This dearth of litigation bespeaks the common and settled understanding that the President is not subject to monetary liability. Moreover, on the infrequent occasions when such litigation has been commenced, the federal courts have consistently ruled that the President cannot be held personally accountable for damages. See *Reese* v. *Nixon*, 347 F. Supp. 314, 316-317 (C.D. Cal. 1972), aff'd in pertinent part, No. 72-3070 (9th Cir. May 3, 1974) (I J.A. 95-97); *Bohmer* v. *Nixon*, Civil No. 75-4-T (S.D. Cal. June 16, 1976) (I J.A. 122-126); *Davis* v. *Nixon*, Civil No. 73-1520-LTL(G) (C.D. Cal. June 18, 1974) (I J.A. 114-121); *Fonda* v. *Nixon*, Civil No. 73-2442-MML (C.D. Cal. May 23, 1974) (I J.A. 98-113). See also *Barr* v. *Matteo*, 360 U.S. 564, 583 (1959) (Warren, C.J., dissenting) (absolute immunity of officials who were appointed by and report to the President "partakes of presidential immunity"); *Mellon* v. *Brewer*, 18

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of the law, *and does he possess any privileges like these? If a man meets him walking alone in the streets and insults him, or if one of ruffian manners should enter his house, and even abuse him there, has your President any privileges like these? Can he commit and imprison without a trial? No sir, he must resort to the laws for satisfaction*, where the person charged with outrage will be heard, and where each party will have justice done them, by men who ought to be so impartially summoned as that no undue bias will be found, when they come to decide. *No privilege of this kind was intended for your Executive*, nor any except that which I have mentioned for your Legislature. The Convention which formed the Constitution well knew that this was an important point, and no subject had been more abused than privilege. They therefore determined to set the example, in merely limiting privileges to what was necessary, and no more.

Thus, the privilege addressed by Pinckney was not a presidential immunity from damages actions (or, for that matter, any other privilege or immunity incident to the presidency), but instead concerned the prerogative of the President summarily to charge, convict, and punish for an offense without resort to judicial proceedings. Hence, the court of appeals incorrectly read Pinckney's comments to militate against an absolute immunity for the President.

F.2d 168, 172 (D.C. Cir.), cert. denied, 275 U.S. 530 (1927) (publication of allegedly defamatory "official communication or report by the President would not have formed the basis of an action for libel").

3.a. In addition to its historical and precedential support, this doctrine—that the President is absolutely immune from personal damages liability for his official acts—also rests on compelling grounds of public policy, reinforced by the separation of powers (see note 19, *supra*). Damages actions against the President challenging the legality of his official acts would constitute a substantial intrusion into the President's constitutional responsibilities. The risk of personal liability would serve to inhibit the fearless and decisive exercise of presidential authority, and "the public trust [placed in the President] would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages." *Imbler* v. *Pachtman*, 424 U.S. 409, 424-425 (1976).

The federal executive power is vested in whole in the President, and he is charged with the faithful execution of his Office and the preservation and defense of the Constitution. See Art. II, § 1; see also, *e.g.*, *Myers* v. *United States*, 272 U.S. 52, 117, 151, 163-164 (1926). As the Nation's Chief Executive, the President is repeatedly called upon to make discretionary decisions on issues that affect the lives of virtually every American citizen. Because the easier or less controversial matters are disposed of at a lower level, it is the rare presidential decision that does not involve difficult choices among reasonable alternatives or adversely affect some segment of the Nation.

Undeniably, the President's discharge of these "grave, complex and unique responsibilities" (Pet. App. 53a (Gesell, J., concurring)) should be motivated solely by considerations of the public welfare, not by fear of personal liability in damages. Yet any concern for the financial security of his family and himself would divert the President's attention from the competing public policies on which his decisions should be made; especially in light of the vast

potential liability confronting him for virtually every presidential decision, it is unavoidable that (in the absence of an absolute immunity from damages) such personal considerations would intrude themselves at least in some instances. As Judge Learned Hand explained in *Gregoire* v. *Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), cert. denied, 339 U.S. 949 (1950), "to submit * * * [the President] to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." Thus, "[t]he societal interest in providing * * * [the President] with the maximum ability to deal fearlessly and impartially with * * * [the duties of his Office is] an acceptable justification for official immunity." *Ferri* v. *Ackerman*, 444 U.S. 193, 203 (1979) (footnote omitted).[24]

Furthermore, the President is a natural target for those dissatisfied by the outcome of his decisions. The matters that come to the attention of the President are necessarily the kind that, in difficulty and importance, are likely to "arouse the most intense feelings." *Butz* v. *Economou*,

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[24] The immunity of the President is because of his official position. He is a great and necessary part of our government. The legislative branch is composed of many members, while the judicial branch is a collective body and it would be difficult to injure either numerically so as to interfere with the administration of the Government. But it is wholly different with the executive branch. One man constitutes all there is of that, and upon him the Constitution has placed many great and important duties, and these duties are constant. He does not sit in authority at stated intervals like Congress and the courts. There is no recess in the discharge of his official duties. From the time he takes the oath until his office expires there is a continuity of official obligations and duties, sacredly and solemnly imposed upon him by the Constitution. Anything which impairs his usefulness in the discharge of his duties, however slight, to that extent impairs the operation of the Government.

* * * * *

The President is the highest official of the Government and by the express terms of the Constitution is the executive branch of the Government. The language of the Constitution is, "*The*

438 U.S. 478, 509 n.36 (1978), quoting *Pierson* v. *Ray*, 386 U.S. 547, 554 (1967); see also *Stump* v. *Sparkman*, 435 U.S. 349, 364 (1978); *Imbler* v. *Pachtman*, *supra*, 424 U.S. at 425; *Bradley* v. *Fisher*, 80 U.S. (13 Wall.) 335, 348 (1871). It is all too easy for disgruntled individuals or groups, simply by alleging an "unconstitutional animus" (*Butz* v. *Economou*, *supra*, 438 U.S. at 512), to carry their disagreement from the political arena to the courtroom in an effort to influence or harass the President, to gain public attention for their cause or position, to improve their situation by means of a negotiated settlement, or to further their self-interest in some other way. As Judge Gesell noted, "many of these cases are political in character [and] involve highly controversial acts" (Pet. App. 52a). The prospect of a burgeoning number of lawsuits against the President in his individual capacity militates strongly in favor of absolute immunity.[25]

Of course, there is also an undeniable public interest in avoiding abuses of presidential authority.[26] But, as the

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executive power shall be vested in a President of the United States of America." That means all the executive power of the government, without limitation or reserve, is vested in the President, and it is only because the President is clothed with so extraordinary a power that he can be said to be exempt from the operations of the law.

II D. Watson, *The Constitution of the United States* 1023–1024, 1025–1026 (1910).

[25] See Pet. App. 51a (Gesell, J., concurring) ("with increasing frequency in this jurisdiction and throughout the country plaintiffs are filing suits seeking damage awards against high government officials in their personal capacities based on alleged constitutional torts"). See also, *e.g.*, *Nixon* v. *Fitzgerald*, petition for cert. pending, No. 79–1738 (filed May 2, 1980); *Clark* v. *United States*, 481 F. Supp. 1086 (S.D.N.Y. 1979), stay granted, Nos. 80–6016, 80–6024 (2d Cir. June 24, 1980).

[26] As Judge Hand explained in *Gregoire* v. *Biddle*, *supra*, 177 F.2d at 581:

> It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good,

court of appeals recognized (Pet. App. 45a), the occasions of such abuse are likely to be rare. Moreover, there exist means wholly apart from damages actions to deter the improper exercise of presidential authority. The momentous nature of his undertaking, the visibility of his position, and the solemn oath to which he swears (as prescribed in the Constitution itself (Art. II, §1)), all work to impress upon the President the grave responsibilities of his Office and the public trust he bears. Beyond that, "there are obvious political checks against an incumbent[ ] [President's] abuse of * * * [his position]." *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 448 (1977). For instance, the system of checks and balances, including the process of congressional oversight, acts to constrain and to detect the illegitimate uses of the President's powers.[27] As the ultimate measure, Congress can impeach and remove a Presi-

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> should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried * * *. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.

See also *Butz* v. *Economou*, *supra*, 438 U.S. at 529 (Rehnquist, J., dissenting) ("[T]here are inevitable trade-offs in connection with any doctrine of official liability and immunity. * * * [While] an occasional failure to redress a claim of official wrongdoing would result from the doctrine of absolute immunity * * *, it * * * [is] a lesser evil than the impairment of the ability of responsible public officials to govern.").

[27] See *United States* v. *Brewster*, 408 U.S. 501, 517–518, 523 (1972):

> [U]nlike England with no formal, written constitutional limitations on the monarch, [the authors of our Constitution] defined limits on the co-ordinate branches, providing other checks to protect against abuses of the kind experienced in that country.
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> The check-and-balance mechanism * * * [has discouraged] abuses of power * * * [and has not] tolerated them long when they arose.

Congress has recently demonstrated its capacity to oversee the actions of the Executive Branch, including executive actions in the areas of

dent who is unfaithful to the duties of his Office.[28] And a President who has been convicted upon impeachment can be criminally prosecuted for any such offenses (Art. I, § 3).[29] In addition, the critical scrutiny received by a Presi-

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national security and foreign affairs. See, *e.g.*, Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783; War Powers Resolution, 50 U.S.C. 1541 *et seq.*; *Final Report of the Senate Select Committee to Study Governmental Operations With Respect to Intelligence Activities*, S. Rep. No. 94-755, 94th Cong., 2d Sess. (1976) (Church Committee).

[28] The impeachment power provides a substantial safeguard. Article II, paragraph (2) of the articles of impeachment recommended by the House Judiciary Committee against petitioner Nixon was based precisely upon the acts alleged by respondents in this suit. See H.R. Rep. No. 93-1305, 93d Cong., 2d Sess. 146-150 (1974).

[29] In holding that the President is entitled to only a qualified immunity, the court of appeals construed the Impeachment Clause to "reveal[ ] that incumbency does not relieve the President of the routine legal obligations that confine all citizens" (Pet. App. 43a, quoting *Nixon* v. *Sirica*, 487 F.2d 700, 711 (D.C. Cir. 1973) (en banc)). But the Clause does not support the court's conclusion. The cited provision that the official "convicted [upon impeachment] shall * * * be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law," is limited to criminal prosecutions and was designed to make clear that a prosecution following impeachment and conviction would not be barred by principles of double jeopardy. See, *e.g.*, II J. Story, *Commentaries on the Constitution of the United States* §§ 780, 781 (1833 ed.); see also *United States* v. *Isaacs*, 493 F.2d 1124, 1142 (7th Cir.), cert. denied, 417 U.S. 976 (1974); *Nixon* v. *Sirica*, *supra*, 487 F.2d at 757 (MacKinnon, J., concurring in part and dissenting in part). At all events, the applicability of the Impeachment Clause to federal judges has not foreclosed recognition of an absolute judicial immunity from damages liability, and no different conclusion should obtain in the case of the President.

In rejecting an absolute presidential immunity, the court of appeals also stressed the lack of any express immunity for the Executive Branch in the Constitution (Pet. App. 42a-43a). This line of reasoning was rejected by the Court in *United States* v. *Nixon*, 418 U.S. 683, 705-706 n.16 (1974), quoting *Marshall* v. *Gordon*, 243 U.S. 521, 537 (1917) ("the silence of the Constitution on this score is not dispositive. '* * * [T]hat which [is] reasonably appropriate and relevant to the exercise of a granted power [is] to be considered as accompanying the grant' "). We also note that the only express constitutional immunity for governmental officers—the Speech or Debate Clause (Art. I,

dent during the electoral process acts to curb the occurrences of presidential misconduct; this factor has unique application to the President, who is the only elected official in the Executive Branch of the federal government. So, too, the President's role as the leader of his political party adds further effect to the constraints imposed through the electoral process. Moreover, the force of public opinion and the vigilance of the news media operate to deter and apprehend a President about to forsake the honor and confidence reposed in him.[30] Finally, the existence of judicial review of presidential actions[31] serves to contain and correct the unauthorized exercise of the President's powers.

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§ 6)—was grounded in the long and difficult development of legislative privilege in England. See *United States* v. *Johnson*, 383 U.S. 169, 177–183 (1966). In light of this history, the Framers perceived the need expressly to preserve congressional independence by "protecting against possible prosecution by an unfriendly executive and conviction by a hostile judiciary" (*id.* at 179); the absence of a similar background regarding the other two branches of government elucidates the omission of an express immunity provision to safeguard their independence. In any event, despite the lack of any specific constitutional provision, absolute immunities for judges and prosecutors are well-established. See *Butz* v. *Economou*, 438 U.S. 478 (1978); *Stump* v. *Sparkman*, 435 U.S. 349 (1978); *Imbler* v. *Pachtman*, 424 U.S. 409 (1976); *Bradley* v. *Fisher*, 80 U.S. (13 Wall.) 335 (1871). Indeed, this Court in *Butz* and, at least by implication, in *Imbler*, has upheld absolute immunities for certain Executive Branch officials in the federal government. See also *Yaselli* v. *Goff*, 275 U.S. 503 (1927), aff'g 12 F.2d 396 (2d Cir. 1926). The court of appeals' reasoning in this regard is contrary to these settled principles of absolute immunity.

[30] See *United States* v. *Brewster*, *supra*, 408 U.S. at 523 & n.16:

> [U]nfettered debate in an open society with a free press * * * [has discouraged] abuses of power * * * [and has not] tolerated them long when they arose. * * * [An important practical consideration] is the omnipresence of the news media whose traditional function and competitive inclination afford no immunities to reckless or irresponsible official misconduct.

[31] See, *e.g.*, *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952); *Korematsu* v. *United States*, 323 U.S. 214 (1944); *Hirabayashi* v. *United States*, 320 U.S. 81 (1943); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).

Because of the unique responsibilities and prominence of the presidency, all of these considerations have special bearing with respect to the Office of the President. As discussed above (see pages 21–24, *supra*), the Framers of the Constitution, after thorough consideration focusing specifically on the presidency, concluded that the foregoing safeguards were sufficient to channel the exercise of presidential authority. As they recognized, "[s]elf-discipline and the voters must be the ultimate reliance for discouraging or correcting *** abuses." *Tenney* v. *Brandhove*, 341 U.S. 367, 378 (1951). Damages actions against the President are an unnecessary additional deterrent, whose benefits are far outweighed by the costs they would impose on the proper functioning of the presidency, and, in turn, on the Nation.

b. It is also evident that a qualified or conditional immunity for the President would be seriously inadequate and would thereby "disserve the broader public interest * * * [in the] vigorous and fearless performance of the * * * [President's] duty * * *." *Imbler* v. *Pachtman*, *supra*, 424 U.S. at 427. "If the mere allegation that a * * * [presidential] act was undertaken for an unworthy purpose would lift the protection of the * * * [immunity], then the * * * [immunity] simply would not provide the protection historically undergirding it." *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491, 508–509 (1975). To the extent that only a qualified immunity is available to the President, the allegations of improper motive would have to "be inquired into * * * [and the President] would be subjected to the same vexatious litigation upon such allegations, whether the motives had or had not any real existence." *Bradley* v. *Fisher*, *supra*, 80 U.S. (13 Wall.) at 354.

In our view, recognition of only a qualified presidential privilege would lead to an extreme and unwarranted interference with the decision-making process of the Executive Branch and the execution of presidential duties under Article II of the Constitution. As discussed below (see pages 50–51, 60–61, *infra*), a qualified immunity rests on

the reasonableness of the decision and the good faith with which it was made. Thus, the rule of law adopted by the court of appeals, by requiring the President routinely to explain and justify his decisions in response to civil damages suits, would result in recurring judicial oversight of the President's discretionary actions. Indeed, the court of appeals recognized that such review would occur and that, at least with respect to the good-faith element of the immunity defense, would ordinarily necessitate a full trial (Pet. App. 38a–40a). This excessive intrusion into the very Office of the President is unparalleled in our Nation's history and should be scrupulously avoided. See *Mississippi* v. *Johnson*, 71 U.S. (4 Wall.) 475, 499–501 (1866); *Kendall* v. *United States*, 37 U.S. (12 Pet.) 524, 610 (1838); see also *Committee to Establish the Gold Standard* v. *United States*, 392 F. Supp. 504, 506 (S.D.N.Y. 1975); *Meyers* v. *Nixon*, 339 F. Supp. 1388, 1391 (S.D.N.Y. 1972); *Atlee* v. *Nixon*, 336 F. Supp. 790, 792 (E.D. Pa. 1972); *San Francisco Redevelopment Agency* v. *Nixon*, 329 F. Supp. 672 (N.D. Cal. 1971); *Suskin* v. *Nixon*, 304 F. Supp. 71, 72–73 (N.D. Ill. 1969); *Trimble* v. *Johnston*, 173 F. Supp. 651, 652–654 (D.D.C. 1959).

A qualified immunity is rendered further inadequate by the litigation process itself. In order to defend himself, the President would generally be forced to reveal not only the intimate details of executive decision-making but also the confidential and highly sensitive information on which he based his actions. This is directly at odds with the "presumptive privilege for Presidential communication" recognized in *United States* v. *Nixon*, 418 U.S. 683, 708 (1974). As the Court there explained (*id.* at 705–706, 708, 715; footnotes omitted):

> [One] ground [supporting the privilege] is the valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties; the importance of this confidentiality is too plain to require further discussion. Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detri-

> ment of the decisionmaking process. Whatever the nature of the privilege of confidentiality of Presidential communications in the exercise of Art. II powers, the privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties. Certain powers and privileges flow from the nature of enumerated powers; the protection of the confidentiality of Presidential communications has similar constitutional underpinnings.
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> The expectation of a President to the confidentiality of his conversations and correspondence * * * [is premised in part on] the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking. A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. These are the considerations justifying a presumptive privilege for Presidential communications. The privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution.* * *
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> It is therefore necessary in the public interest to afford Presidential confidentiality the greatest protection consistent with the fair administration of justice.

See also Pet. App. 51a, 53a (Gesell, J., concurring). In addition to this sweeping breach of presidential confidentiality, the release of such information would often be prohibited by law or otherwise contrary to the national interest. Cf. *United States* v. *Reynolds*, 345 U.S. 1 (1953).[32] And beyond these disclosure concerns, the complexity and gravity of presidential responsibilities, and the pressures

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[32] Moreover, in the case of a former President, as here, the relevant materials simply may not be available for use in the lawsuit. See II J.A. 7.

The Fourth Circuit has recently held that a government official personally sued for damages must bear the loss if his defense rests on

and urgency under which they are exercised, may be impossible to convey to a lay jury.

> The presentation of such issues in a * * * [personal damages] action often would require * * * the resolution of some technical issues by the lay jury. It is fair to say, we think, that the honest * * * [President] would face greater difficulty in meeting the standards of qualified immunity than other executive or administrative officials. Frequently acting under serious constraints of time and even information, a * * * [President] inevitably makes many decisions that could engender colorable claims of constitutional deprivation. Defending these decisions, often years after they were made, could impose unique and intolerable burdens upon a * * * [President] responsible annually for hundreds of * * * [major decisions].

Imbler v. *Pachtman*, *supra*, 424 U.S. at 425–426. See also Pet. App. 52a (Gesell, J., concurring) ("these cases * * * will necessarily embroil juries in passing upon the intricacies of executive decisionmaking").

Finally, the protections necessary for the Office of the President "'would be of little value if * * * [the President] could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against * * * [him] based upon a jury's speculation as to motives.'" *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency*, 440 U.S. 391, 405 (1979), quoting *Tenney* v. *Brandhove*, 341 U.S. 367, 377 (1951). The President should not be put to the risk of convincing a jury several years later, in the aftermath of subsequent national events and possible political fervor, that he acted reasonably and in good faith at the time. See *Imbler* v. *Pachtman*, *supra*, 424 U.S. at 425–426. See also Pet. App. 52a (Gesell, J., concurring) ("many of these cases are political in character [and] involve highly con-

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materials that cannot be disclosed because of military and state secrets. *Farnsworth Cannon, Inc.* v. *Grimes*, No. 79–1260 (4th Cir. June 12, 1980), slip op. 10–16. Under this analysis, it would appear that the President would lose his qualified immunity by default whenever, as is likely, the information necessary to establish that defense is withheld on grounds of government privilege.

troversial acts"). "'In times of political passion, dishonest or vindictive motives are readily attributed to * * * [presidential] conduct and as readily believed.'" *Eastland* v. *United States Servicemen's Fund*, *supra*, 421 U.S. at 509, quoting *Tenney* v. *Brandhove*, *supra*, 341 U.S. at 378. "The fate of an official with qualified immunity depends upon the circumstances and motivations of his actions, as established by the evidence at trial" (*Imbler* v. *Pachtman*, *supra*, 424 U.S. at 419 n.13), and "in the face of [a mistake] an official may later find himself hard put to it to satisfy a jury of his good faith" (*Gregoire* v. *Biddle*, *supra*, 177 F.2d at 581).

Likewise, the burdens of such litigation—the time, the expense, the personal anxiety, and the unavoidable disruption of official duties—should not be imposed upon the President. "'[A] private civil action * * * creates a distraction and forces * * * [the President] to divert * * * [his] time, energy, and attention from * * * [his presidential] tasks to defend the litigation.'" *Supreme Court of Virginia* v. *Consumers Union of the United States, Inc.*, No. 79-198 (June 2, 1980), slip op. 13, quoting *Eastland* v. *United States Servicemen's Fund*, *supra*, 421 U.S. at 503; see also *Imbler* v. *Pachtman*, *supra*, 424 U.S. at 425. As Thomas Jefferson explained during his presidency, "[t]he Constitution enjoins [the President's] constant agency in the concerns of six millions of people. Is the law paramount to this, which calls on him on behalf of a single one?" II D. Watson, *The Constitution of the United States* 1014 (1910).[33] Accordingly, "[t]o preserve * * * [presidential] independence * * * [the President] '* * * should be protected not only from the consequences of litigation's results but also from the burden of defending * * * [him-

[33] As this Court recently noted in *Herbert* v. *Lando*, 441 U.S. 153 (1979), a plaintiff who bears the burden of proving malice must be given a fair opportunity to question the defendant to develop the relevant evidence. The same rule would presumably apply when it is the defendant who bears the burden of proof with respect to his subjective good faith (see *Gomez* v. *Toledo*, No. 79-5601 (May 27, 1980)) and the plaintiff "make[s] 'some showing' of malice to state a genuine issue as to the *bona fides* of the official's [qualified] immunity defense" (*Chagnon* v. *Bell*, No. 79-1232 (D.C. Cir. Aug. 14, 1980), slip op. 29-30). Thus, a rule limiting the President to a qualified immunity might re-

self].'" *Supreme Court of Virginia* v. *Consumers Union of the United States, Inc.*, *supra*, slip op. 12, quoting *Dombrowski* v. *Eastland*, 387 U.S. 82, 85 (1967), and *Tenney* v. *Brandhove*, *supra*, 341 U.S. at 376; see also *Hutchinson* v. *Proxmire*, 443 U.S. 111, 123 (1979).[34]

4. The foregoing considerations are especially apt with regard to the areas of presidential responsibility involved in the present suit—national security and foreign affairs. The President's broad powers in these matters—matters that involve "important, complicated, delicate and manifold problems" (*United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936))—flow directly from Article II of the Constitution and are beyond dispute. The President is "both * * * [the] Commander-in-Chief and * * * the Nation's organ for foreign affairs * * *." *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship*

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quire the President to attend a deposition or answer interrogatories in a private civil suit, at the expense of his duties as Chief Executive, or risk the imposition of sanctions, including a default judgment. See Fed. R. Civ. P. 37(b). Indeed, the court of appeals candidly acknowledged that "[q]uestions of intent and subjective attitude frequently cannot be resolved without direct testimony of those involved" (Pet. App. 38a). This disruption of daily activities might be justified when dealing with a subordinate executive official, but it should not be permitted in the case of the President.

[34]The Court's expectation in *Butz* v. *Economou* that "[i]nsubstantial lawsuits can be quickly terminated by federal courts alert to the possibilities of artful pleading" and that "firm application of the Federal Rules of Civil Procedure will ensure that federal officials are not harassed by frivolous lawsuits" (438 U.S. at 507, 508) has proven to be a false hope. See *Hanrahan* v. *Hampton*, No. 79-912 (June 2, 1980), slip op. 5-7 (Powell, J., concurring in part and dissenting in part); see also Pet. App. 40a n.121; *id.* at 51a-53a (Gesell, J., concurring). Indeed, the court of appeals in this case conceded (*id.* at 38a) that pretrial procedures often are not suitable for resolving the validity of a qualified-immunity defense. Despite its recognition that personal damages actions would impose "extraordinary practical difficulties * * * [on] a President" (*id.* at 47a), the court of appeals could only exhort that district courts "carefully examine any pretrial claim [for summary judgment]" (*id.* at 38a) and "be sensitive" to these problems in overseeing the course of the litigation (*id.* at 47a). As Judge Gesell rightly observed (*id.* at 51a), this limited approach "extend[s] no more protec-

Corp., 333 U.S. 103, 111 (1948). "In the governmental structure created by our Constitution, the Executive is endowed with enormous power in the two related areas of national defense and international relations." *New York Times Co.* v. *United States*, 403 U.S. 713, 727 (1971) (Stewart, J., concurring); see also *id.* at 741 (Marshall, J., concurring); *id.* at 756-758 (Harlan, J., dissenting); *id.* at 761 (Blackmun, J., dissenting). "[T]he President of the United States has the fundamental duty, under Art. II, §1, of the Constitution, to 'preserve, protect and defend the Constitution of the United States.' Implicit in that duty is the power to protect our Government against those who would subvert or overthrow it by unlawful means. * * * We recognize * * * the constitutional basis of the President's domestic security role * * *." *United States* v. *United States District Court*, 407 U.S. 297, 310, 320 (1972). In exercising this constitutional authority, the President must be ever mindful of the vital duty with which he is charged:

> It has been said that "[t]he most basic function of any government is to provide for the security of the individual and of his property." *Miranda* v. *Arizona*, 384 U.S. 436, 539 (1966) (White, J., dissenting). And unless Government safeguards its own capacity to function and to preserve the security of its people, society itself could become so disordered that all rights and liberties would be endangered. As Chief Justice Hughes reminded us in *Cox* v. *New Hampshire*, 312 U.S. 569, 574 (1941):
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> > "Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses."

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tion to top federal officials than is afforded by the normally applicable summary judgment principles" and "substantially undermines, if not destroys, the immunity doctrine." Contrary to the Court's admonition in *Butz*, "trial judges will almost automatically have to send such cases to full trials on the merits" (Pet. App. 52a) (Gesell, J., concurring). See also *Nixon* v. *Fitzgerald*, petition for cert. pending, No. 79-1738 (filed May 2, 1980) (trial necessary to determine qualified immunity of President for refusal to order the rehiring of government employee).

United States v. *United States District Court*, *supra*, 407 U.S. at 312.

Nor can it be doubted that secrecy is essential to the proper execution of these presidential powers.

> [I]t is elementary that the successful conduct of international diplomacy and the maintenance of an effective national defense require both confidentiality and secrecy. Other nations can hardly deal with this Nation in an atmosphere of mutual trust unless they can be assured that their confidences will be kept. And within our own executive departments, the development of considered and intelligent international policies would be impossible if those charged with their formulation could not communicate with each other freely, frankly, and in confidence. In the area of basic national defense the frequent need for absolute secrecy is, of course, self-evident.

New York Times Co. v. *United States*, *supra*, 403 U.S. at 728-730 (Stewart, J., concurring). As the Court has recently observed, "[t]he Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service." *Snepp* v. *United States*, Nos. 78-1871, 79-265 (Feb. 19, 1980), slip op. 3 n.3. See also *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, *supra*, 333 U.S. at 111; *United States* v. *Curtiss-Wright Export Corp.*, *supra*, 299 U.S. at 319-321; *Totten* v. *United States*, 92 U.S. (2 Otto) 105 (1875).[35]

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[35] President Washington explained this need for secrecy in declining the request of the House of Representatives to produce materials relating to the Jay Treaty:

> The nature of foreign negotiations requires caution, and their success must often depend on secrecy; and even when brought to a conclusion a full disclosure of all the measures, demands, or eventual concessions which may have been proposed or contemplated would be extremely impolitic; for this might have a pernicious influence on future negotiations, or produce immediate inconveniences, perhaps danger and mischief, in relation to other powers. The necessity of such caution and secrecy was one cogent

The national interest in the President's successful conduct of this country's defense and foreign affairs strongly supports an absolute presidential immunity from personal damages liability. Least of all in these critical areas should there be countenanced even the slightest inhibition on the vigorous and resolute discharge of the President's constitutionally based responsibilities. Likewise, it is in precisely these areas that the judiciary should be most unwilling, in the guise of deciding monetary liability, to undertake review of the President's discretionary decisions. It is also in these areas that litigation on the reasonableness and good faith of the President's actions would most surely both endanger the national welfare through the disclosure of confidential information and be beyond the ken of the trier of fact. And there is in these volatile areas a substantial risk of damages actions by those dissatisfied, for whatever reason, with the President's determinations.

5. The grounds offered by the court of appeals to afford only a qualified presidential immunity are unpersuasive.

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reason for vesting the power of making treaties in the President, with the advice and consent of the Senate, the principle on which that body was formed confining it to a small number of members. To admit, then, a right in the House of Representatives to demand and to have as a matter of course all the papers respecting a negotiation with a foreign power would be to establish a dangerous precedent.

I J. Richardson, *Messages and Papers of the Presidents* 194–195 (1896), quoted in *United States* v. *Curtiss-Wright Export Corp.*, *supra*, 299 U.S. at 320–321. Indeed, the Framers of the Constitution viewed the President's ability to maintain secrecy and confidentiality regarding foreign affairs and national security as one of the most beneficial aspects of his Office. See II M. Farrand, *supra*, at 538 (remarks of James Wilson); *ibid.* (remarks of Roger Sherman); IV M. Farrand, *supra*, at 17 (remarks of George Mason); *The Federalist* No. 64 (J. Jay) at 12–13 (1914 ed.); *The Federalist* No. 70 (A. Hamilton), *supra*, at 50; *The Federalist* No. 75 (A. Hamilton) at 83 (1914 ed.); III J. Story, *supra*, §§ 1504 at 357, 1505 at 358, 1507 at 360.

The court first reasoned that the existence of a qualified immunity would not "hinder effective governance of the nation * * * [because] suits that may successfully be pursued against a President will be quite rare" (Pet. App. 45a; footnote omitted). As previously discussed, however (see pages 26–28, 32–37, *supra*), there is in fact every reason to believe that personal damages actions against the President will inhibit the execution of his responsibilities and thereby impair the essential operation of government. Moreover, in striking the balance between competing public policies, the dearth of meritorious cases against the President militates in favor of, rather than against, an absolute presidential immunity. See *Gregoire* v. *Biddle*, *supra*, 177 F.2d at 581. At all events, it is the prospect and vexation of these suits, not just their actual success, that serves to chill the fearless and resolute exercise of presidential authority.

The court of appeals also concluded that the President is entitled to no greater immunity than the *Butz* good-faith defense generally enjoyed by executive officers because he cannot be set "apart from * * * other high Executive officials" (Pet. App. 42a) and "no defensible distinction can be made between the President and other high Executive officers for immunity purposes" (*id.* at 48a n.144). However, as already discussed (see pages 25–38, *supra*), the President does occupy a position far different from those held by his subordinates in the Executive Branch. As the highest elected official in the Nation and the only constitutional officer in the Executive Branch, the Chief Executive possesses powers and responsibilities that are unparalleled in the government, especially in the areas of national security and foreign affairs. The complexity, importance, and controversial nature of the issues that come to the President's attention; the commitment of the full executive power to a single individual, the express duties imposed on him by the Constitution, and the manifold matters, both domestic and foreign, that require his personal involvement; his unique status as the only official in the Executive Branch who is chosen by and directly accountable to

the electorate—these and like considerations serve to distinguish the Office of the President.[36]

In rejecting an absolute immunity, the court of appeals further observed that *Butz* v. *Economou* does not permit any greater protection for the President than the qualified immunity afforded the governor of a state in actions under 42 U.S.C. 1983 (Pet. App. 48a n.144, citing *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974)). But, once again, this line of argument ignores the singular role of the Office of the President. The authority and duties of a governor fall far short, in both kind and degree, of those of the President. In particular, a governor has no responsibility with regard to the critical areas of national defense and foreign policy. See *United States* v. *Curtiss-Wright Export Corp.*, *supra*, 299 U.S. at 316. As the Court recognized in *Butz* v. *Economou*, the governor of a state is analogous not to the President but to "the head of a federal department" (438 U.S. at 501; see also *id.* at 500-501 n.28). Moreover, a governor is not a federal official and does not exercise powers delegated by the Constitution. Hence, judicial oversight of the performance of his functions does not threaten an interference with constitutional obligations or present problems implicating the separation of powers.[37]

Finally, the court of appeals incorrectly viewed an absolute presidential immunity as inconsistent with "our tra-

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[36] Courts have long been sensitive to the special role of the President and have endeavored, to the extent they have jurisdiction over him at all, to safeguard the President from the burdens and distractions of litigation in which he is named as a defendant. See page 33, *supra*; see also *United States* v. *Nixon*, *supra*, 418 U.S. at 715; *National Treasury Employees Union* v. *Nixon*, 492 F.2d 587, 606 (D.C. Cir. 1974); *Nixon* v. *Sirica*, 487 F.2d 700, 709 (D.C. Cir. 1973) (en banc). Cf. *United States* v. *Burr*, 25 Fed. Cas. 30, 34 (No. 14,692d) (C.C.D.Va. 1807).The same concern justifies an absolute presidential immunity in damages actions.

[37] By the same token, the court of appeals' analogy between the President and a state governor fails to appreciate that Congress, through the federal system of checks and balances, its investigative authority, and its impeachment power, provides alternative restraints on the President that are absent with respect to a governor. In addi-

dition of equal justice under law" (Pet. App. 49a) and the maxim that "'[n]o man in this country is so high that he is above the law'" (*ibid.*, quoting *United States* v. *Lee*, 106 U.S. (16 Otto) 196, 220 (1882)). It has never been thought that judicial officers, prosecuting attorneys, and state legislators were placed "above the law" because of their absolute immunity. See, *e.g.*, *Supreme Court of Virginia* v. *Consumers Union of the United States, Inc.*, *supra*; *Butz* v. *Economou*, *supra*, 438 U.S. at 508–517; *Stump* v. *Sparkman*, *supra*; *Imbler* v. *Pachtman*, *supra*. The immunity "'is not for the protection or benefit of a malicious or corrupt * * * [official], but for the benefit of the public'" (*Imbler* v. *Pachtman*, *supra*, 424 U.S. at 418 n.12, quoting *Pierson* v. *Ray*, 386 U.S. 547, 554 (1967); see also *Eastland* v. *United States Servicemen's Fund*, *supra*, 421 U.S. at 502, quoting *United States* v. *Brewster*, 408 U.S. 501, 507 (1972)). "The privilege is not a badge or emolument of exalted office" (*Barr* v. *Matteo*, 360 U.S. 564, 572 (1959) (plurality opinion)), but instead rests on the acknowledged necessity that the legal system must "reconcile the plaintiff's right to compensation with the need to protect the decisionmaking processes of an executive department" (*Butz* v. *Economou*, *supra*, 438 U.S. at 503).

The fact that the principle of separation of powers and the "special functions" of the presidency (*Butz* v. *Economou*, *supra*, 438 U.S. at 508) give rise to an absolute presidential immunity does not "mean in any sense that a President is above the law, but relates to the singularly unique role under Art. II of a President's communications and activities * * * [and] to the performance of

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tion, the important national political checks applicable to a President are also less effective in the case of a governor. "The President is the only nationally elected officer, and thus, at least arguably, our most politically accountable official." Cutler & Johnson, *Regulation and the Political Process*, 84 Yale L.J. 1395, 1411 (1975). For these reasons, "the assumption that the Federal Government could keep its own officers under control [even without constitutional tort actions]" (*District of Columbia* v. *Carter*, 409 U.S. 418, 429–430 (1973)) serves to distinguish the immunity appropriate for the President and that due a state governor.

duties under that Article." *United States* v. *Nixon*, *supra*, 418 U.S. at 715.[38] The threat of personal liability for the President, and the routine judicial oversight of his decisions, would dangerously inhibit the vigorous and decisive discharge of his constitutional duties and unduly intrude into his decision-making processes. It would also impair the national interest to burden the President's uniquely valuable time and attention with the defense of such personal damages suits and to compel him, at the risk of individual liability, to explain and justify his actions. Accordingly, both the Constitution and important considerations of public policy require that the President be accorded an absolute immunity from damages liability, in order that he may exercise the duties of his Office "without harassment or intimidation" (*Butz* v. *Economou*, *supra*, 438 U.S. at 512) and may pursue the objectives of his administration "sanctioned by the electorate" (*Elrod* v. *Burns*, 427 U.S. 347, 367 (1976) (plurality opinion)).

B. Absolute Presidential Immunity Extends To Those Who Act On The President's Behalf At His Direction

If, as we urge, the Court recognizes the existence of an absolute presidential immunity from damages liability, that immunity should extend to those who act on the President's behalf at his direction. Since President Nixon "authorized this entire program" (I J.A. 212), and since petitioners Kissinger, Mitchell, and Haldeman "were operating under [his] specific authority and were carrying

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[38] The Framers of the Constitution were well aware of both the potential dangers presented by the Executive and the inviolability of the King under the English legal system. See pages 21–24, *supra;* see also *The Federalist* No. 69 (A. Hamilton), *supra*, at 41, 47. In light of that awareness, they expressly provided that the President "would be amenable to personal punishment and disgrace" through impeachment, removal, and criminal prosecution (*id.* at 47). An absolute presidential immunity, therefore, does not elevate a President above the law but instead recognizes his accountability to the law in a way that also allows the uninhibited conduct of his Office.

out [his] express orders" (I J.A. 48–49), they are entitled to a derivative absolute immunity in this case.

The responsibilities of the presidency are extraordinarily numerous, complex, and far-reaching. Of necessity, therefore, the President must delegate to others many of the tasks and functions relating to his Office. "[I]t is literally impossible, in view of the complexities of the modern * * * [presidency], for * * * [the President] to perform * * * [his duties] without the help of aides and assistants * * *." *Gravel* v. *United States*, 408 U.S. 606, 616 (1972). "[T]he President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates." *Buckley* v. *Valeo*, 424 U.S. 1, 135 (1976), quoting *Myers* v. *United States*, 272 U.S. 52, 117 (1926); see also *Barr* v. *Matteo*, 360 U.S. 564, 573 (1959) (plurality opinion). In view of this fact of governmental life, it must be recognized "that the day-to-day work of such aides is so critical to the * * * [President's] performance that they must be treated as the latter's alter egos; and that if they are not so recognized, the central role of the * * * [absolute presidential immunity] will inevitably be diminished and frustrated." *Gravel* v. *United States*, *supra*, 408 U.S. at 616–617. Accordingly, "for the purpose of construing the privilege [the President] and his aide[s] are to be 'treated as one'" (*id.* at 616, quoting *United States* v. *Doe*, 455 F.2d 753, 761 (1st Cir. 1972)), and thus the absolute presidential immunity "applies not only to * * * [the President] but also to his aides insofar as the conduct of the latter would be a protected * * * act if performed by the * * * [President] himself" (408 U.S. at 618).

This concept of derivative immunity is well established in the context of legislative immunity under the Speech or Debate Clause. See *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491, 507 (1975) (chief counsel of Senate subcommittee); *Doe* v. *McMillan*, 412 U.S. 306, 312, 320 (1973) (clerk, staff director, and counsel of House committee, consultant and investigator for the committee, and Superintendent of Documents and Public Printer); *Gravel* v. *United States*, *supra* (personal legislative assistant to senator); see also *Butz* v. *Economou*, *supra*, 438

U.S. at 496 n.23. The Court has also recognized the doctrine of derivative immunity for officials of the Executive Branch. See *Doe* v. *McMillan*, *supra*, 412 U.S. at 323 ("the Printing Office is immune from suit when it prints for an executive department * * * only * * * to the extent that the department head himself would be immune if he ran his own printing press and distributed his own documents"). And the courts of appeals have likewise applied the principle in a variety of circumstances. See, *e.g.*, *Chagnon* v. *Bell*, No. 79-1232 (D.C. Cir. Aug. 14, 1980), slip op. 10-11 n.9 (FBI agents conducting a national-security wiretap at direction of Attorney General); *Ashbrook* v. *Hoffman*, 617 F. 2d 474 (7th Cir. 1980) (partition commissioners appointed by state court in divorce proceeding); *Green* v. *DeCamp*, 612 F.2d 368 (8th Cir. 1980) (counsel for state legislative committee); *Spaulding* v. *Nielsen*, 599 F.2d 728 (5th Cir. 1979) (federal probation officers who prepared presentence report at the direction of the court); *Kermit Construction Corp.* v. *Banco Credito Y Ahorro Ponceno*, 547 F.2d 1 (1st Cir. 1976) (receiver appointed bs state court); *Berndtson* v. *Lewis*, 465 F.2d 706 (4th Cir. 1972) (Navy captain acting at designation of Secretary of the Navy and Vice Admiral in charge of naval personnel); *Heine* v. *Raus*, 399 F.2d 785 (4th Cir. 1968) (CIA employee acting at instructions of CIA Director); but see *Forsyth* v. *Kleindienst*, 599 F.2d 1203, 1216 (3d Cir. 1979), petition for cert. pending, No. 79-1120 (filed Jan. 18, 1980); *Johnson* v. *Alldredge*, 488 F.2d 820, 825 (3d Cir. 1973), cert. denied, 419 U.S. 882 (1974).[39]

In line with these authorities and the sound reasons of public policy on which they rest, petitioners Kissinger, Mitchell, and Haldeman should be absolutely immune in the circumstances of this case. Each of them acted, within the area of his respective responsibility, at the instance of

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[39] We also note that the doctrine of derivative immunity accords with common-law rules of agency and liability. See, *e.g.*, *Restatement (Second) of Agency* § 345 (1958); Comment, *Spying and Slandering: An Absolute Privilege for the CIA Agent?*, 67 Colum. L. Rev. 752, 770 (1967).

the President. It is clear, as respondents recognize (Br. in Opp. 20), that these petitioners were "acting in concert with the President." To deny them a derivative immunity would undermine the absolute protection of the President and would interfere with the unfettered discharge of presidential duties. For the same reasons that support an absolute immunity for the President, the Court should afford a corresponding derivative immunity to officials like Kissinger, Mitchell, and Haldeman, who act on behalf of the President pursuant to his specific directions.[40]

C. Petitioners Kissinger, Mitchell, And Haldeman Are Entitled To Absolute Immunity For Advising The President On Matters Within Their Respective Areas Of Responsibility

Petitioners Kissinger, Mitchell, and Haldeman have been sued in this case, at least in part, because of advice they rendered to the President—National Security Director Kissinger, for counseling the President on the security impact of leaks of sensitive information and for furnishing names of NSC personnel who had access to leaked material; Attorney General Mitchell, for advising the President on matters of law regarding national-security wiretaps; and Assistant to the President Haldeman, for providing information to the President in connection with his assigned review of the summaries of information resulting from the wiretap (see pages 2–5, *supra*). Insofar as the courts below have sought to premise damages liability on these actions, we submit that such a ruling was erroneous

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[40] We emphasize that this case does not involve a vague or general delegation of presidential authority to distant subordinates. Rather, petitioners Kissinger, Mitchell, and Haldeman were all high-ranking officials of the Executive Branch, and, as discussed above (see pages 2–5, *supra*), their roles in the overall program were defined with particularity by the President. While petitioners undoubtedly exercised some discretion in carrying out the President's directives, the nature and limits of their responsibilities were quite specifically designated. As the above cases make clear, the existence of discretion in performing delegated duties does not defeat a claim of derivative immunity.

and that petitioners Kissinger, Mitchell, and Haldeman are entitled to absolute immunity for their roles in advising the President.

The Constitution (Art. II, § 2) authorizes the President to obtain the opinion "of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices."[41] Indeed, even without this express provision, the President's authority to require the opinion of his closest aides and advisors "would result of itself from the office." *The Federalist* No. 74 (A. Hamilton) at 77 (1914 ed.). Thus, high-ranking executive officials act under a constitutional duty when they furnish their opinion to the President in response to his request.

As the Court has recognized, this exchange of information between presidential advisors and the President is protected by a privilege of confidentiality that has "constitutional underpinnings." *United States* v. *Nixon*, *supra*, 418 U.S. at 706. This "privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties * * * [and is] inextricably rooted in the separation of powers under the Constitution" (*id.* at 705, 708). Especially in the areas of national defense and foreign policy (*id.* at 706), such a privilege should be afforded the greatest weight.

In light of the constitutional authority of the President to demand the opinion of his advisors "upon any Subject relating to the Duties of their * * * Offices" and the constitutional privilege that attaches to their communications, subordinate executive officials are entitled to absolute immunity from civil damages actions arising out of advice they gave to the President. Allowing a President's closest

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[41] This provision of the Constitution was adopted with little debate. See, *e.g.*, II M. Farrand, *supra*, at 499, 541–543, 575, 599; II D. Watson, *supra*, at 923–934. Alexander Hamilton believed the provision to be "a mere redundancy in the plan" in light of the President's inherent authority (*The Federalist* No. 74 (A. Hamilton) at 77 (1914 ed.)), but, as Mr. Justice Story noted, "it is not without use, as it imposes a more strict responsibility, and recognises a public duty of high importance and value in critical times" (III J. Story, *supra*, § 1487, at 343).

advisors only a qualified immunity in this regard, with its attendant uncertainties and inhibiting effect, would seriously impair the President's constitutional authority to receive their views. Moreover, as discussed above (see pages 33–34, *supra*), a trial on the issues of reasonableness and good faith would severely breach the constitutional privilege acknowledged in *United States* v. *Nixon* and would deter the expression of "candid, objective, and even blunt or harsh opinions in Presidential decisionmaking" (418 U.S. at 708).[42]

Accordingly, because the spectre of personal damages liability in these circumstances would unduly interfere with the obligations of presidential advisors under Art. II, § 2, to the detriment of "the conduct of the public business" (*Butz* v. *Economou*, *supra*, 438 U.S. at 507), petitioners Kissinger, Mitchell, and Haldeman should be

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[42] These concerns are well illustrated in this case, particularly with regard to petitioner Mitchell. Acting pursuant to his constitutional obligation to advise the President and his statutory duty to "give his advice and opinion on questions of law when required by the President" (28 U.S.C. 511), Attorney General Mitchell informed the President that, in his professional judgment, the initiation of the Halperin wiretap complied with the Constitution. Because the President could not be constrained to act only when the lawful course was clear, the Attorney General was required by his Office to make a legal determination on this complex and unsettled issue. In discharging his responsibility to assist the President in selecting the seemingly lawful action, the Attorney General would have been seriously inhibited if his legal judgment were formed under the threat of personal damages liability.

Indeed, because of the difficulty and novelty of the legal issues that confront the Attorney General, it can be expected that courts will not always agree with his considered legal conclusions. But the court of appeals essentially held that each time the judiciary disagrees with the Attorney General's advice, and suit is brought by an aggrieved party claiming malice or bad faith, the Attorney General must affirmatively establish his personal good faith in the performance of his Office. Such a burden would be regarded as intolerable if imposed on the district courts or courts of appeals each time one of their decisions was set aside on appeal. See *Stump* v. *Sparkman*, *supra*, 435 U.S. at 359–360; *Bradley* v. *Fisher*, *supra*, 80 U.S. (13 Wall.) at 349. The burden can no more easily be borne by the Attorney General. Under the holding of this case, he must prove his good faith by testimony and evidence sub-

held absolutely immune in responding to the President's request for advice. The "special nature of their responsibilities" (*id.* at 511) as Cabinet officers and White House officials, coupled with the safeguards that minimize "the risk of an unconstitutional act" (*id.* at 514),[43] warrant "a full exemption from liability" (*id.* at 508) based on performance of their advisory and counseling functions.[44]

II. PETITIONERS ARE ENTITLED TO QUALIFIED IMMUNITY AS A MATTER OF LAW

In the event the Court concludes, contrary to our contention, that absolute immunity is unavailable in this case, we submit that petitioners are entitled to qualified immunity as a matter of law.

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mitted in lawsuits brought (as here) years after the relevant events have transpired. And the Attorney General may have to explain to a lay jury why he elected one rather than another interpretation of a complex question of law. The imposition of this burden on the Attorney General "would contribute not to principled and fearless decision-making but to intimidation." *Pierson* v. *Ray*, 386 U.S. 547, 554 (1967).

[43] The giving of advice to the President cannot, without more, constitute a constitutional tort. Rather, that advice must first be accepted and acted upon by the President, who exercises his independent judgment based on information from a number of sources. Thus, the internal process of presidential decision-making serves to check the occurrence of unconstitutional actions resulting from the recommendations of a presidential advisor. Moreover, a presidential advisor bears the responsibility for the positions he presents to the President and the consequences of his advice. Especially where the President is making a decision in reliance upon an advisor's recommendation, this internal accountability strongly deters improper conduct by the subordinate.

[44] Apart from the immunities derived from relations with the President, high-ranking government officials in certain circumstances may also be entitled to an independent absolute immunity based on the "special functions" of their positions (*Butz* v. *Economou*, *supra*, 438 U.S. at 508). See, *e.g.*, *Mitchell* v. *Zweibon*, petitions for cert. pending, Nos. 79-881, 79-883 (filed Dec. 7, 1979); *Mitchell* v. *Forsyth*, petition for cert. pending, No. 79-1120 (filed Jan. 18, 1980). While the Court's resolution of the presidential immunity issue will serve to clarify the application of *Butz*, we believe that, in light of the close nexus between presidential directives and the particular conduct at issue here, the Court need not reach any question of independent immunity in this case.

The doctrine of qualified immunity is premised on the belief that "it is not unfair to hold liable the official who knows or should know he is acting outside the law, and that insisting on an awareness of clearly established constitutional limits will not unduly interfere with the exercise of official judgment." *Butz* v. *Economou*, 438 U.S. 478, 506–507 (1978). The Court's decisions have "emphasized * * * that, at least in the absence of some showing of malice, an official would not be held liable in damages * * * unless the constitutional right he was alleged to have violated was 'clearly established' at the time of the violation" (*id.* at 498). See also *Wood* v. *Strickland*, 420 U.S. 308, 322 (1975). This "standard incorporates the idea that liability should not attach unless there was notice that a constitutional right was at risk." *Owen* v. *City of Independence, Missouri*, No. 78–1779 (Apr. 16, 1980), slip op. 12–13 (Powell, J., dissenting). And, of course, a government official is not "'charged with predicting the future course of constitutional law.'" *Wood* v. *Strickland*, *supra*, 420 U.S. at 322, quoting *Pierson* v. *Ray*, 386 U.S. 547, 557 (1967); see also *Butz* v. *Economou*, *supra*, 438 U.S. at 507; *O'Connor* v. *Donaldson*, 422 U.S. 563, 577 (1975). "Constitutional law is what the courts say it is, and * * * even the most prescient lawyer would hesitate to give a firm opinion on matters not plainly settled." *Owen* v. *City of Independence, Missouri*, *supra*, slip op. 13 (Powell, J., dissenting).

In *Procunier* v. *Navarette*, 434 U.S. 555 (1978), the Court applied these principles to hold that the public officials sued in that case were entitled to qualified immunity as a matter of law. Finding that the defendants "could not reasonably have been expected to be aware of a constitutional right that had not yet been declared," the Court concluded "[a]s a matter of law * * * [that] there was no basis for rejecting the immunity defense on the ground that [the officials] knew or should have known that their alleged conduct violated a constitutional right" (*id.* at 565). Accordingly, "the Court held that since the constitutional right allegedly violated had not been authoritatively declared at the time the * * * officials acted, the officials

were entitled, as a matter of law, to prevail on their claim of qualified immunity." *Baker* v. *McCollan*, 443 U.S. 137, 139 (1979).

In the circumstances of the present case, it is clear that the alleged constitutional violations did not involve "settled, indisputable law" or "basic, unquestioned constitutional rights." *Wood* v. *Strickland*, *supra*, 420 U.S. at 321, 322. At the time the instant wiretap was authorized in April and May of 1969, the constitutional standards pertaining to national-security wiretaps were, at the least, unsettled. Indeed, it was less than two years earlier that the Court had first held the Fourth Amendment to be applicable to wiretaps at all. See *Berger* v. *New York*, 388 U.S. 41 (1967). None of the Court's ensuing decisions in *Katz* v. *United States*, 389 U.S. 347 (1967); *Alderman* v. *United States*, 394 U.S. 165 (1969); *Giordano* v. *United States*, 394 U.S. 310 (1969); and *Taglianetti* v. *United States*, 394 U.S. 316 (1969), dealt specifically with national-security wiretaps. To the contrary, the opinions in those cases recognized the separate and unresolved status of such wiretaps under the Fourth Amendment. See *Berger* v. *New York*, *supra*, 388 U.S. at 62;[45] *id.* at 113, 115–116 (White, J., dissenting);[46] *Katz* v. *United States*,

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[45] The Court's opinion in *Berger* cited to the Supplemental Memorandum for the United States in *Schipani* v. *United States*, No. 504 (O.T. 1966), which stated (page 4) that "[p]resent governmental practice * * * prohibits such electronic surveillance in all instances except those involving the collection of intelligence with respect to matters affecting national security. * * * [T]he specific authorization of the Attorney General must be obtained in each instance when the national security exception is sought to be invoked."

[46] As Attorney General Ramsey Clark explained in the congressional hearings cited by Mr. Justice White:

> Chairman Celler. The bill is definitely limited to cases involving national security?
>
> Mr. Clark. Directly involving the national security; that is right.
>
> Chairman Celler. And you do not ask that there be an interposition of a court order in the case of national security; it shall be on your say-so?

supra, 389 U.S. at 358 n.23; *id.* at 359–360 (Douglas, J., concurring); *id.* at 363–364 (White, J. concurring). As Mr. Justice Stewart observed in *Giordano* v. *United States*, *supra*, 394 U.S. at 314 (concurring opinion), "the Court has not in any of these cases addressed itself to the standards governing the constitutionality of electronic surveillance relating to the gathering of foreign intelligence information—necessary for the conduct of international affairs, and for the protection of national defense secrets and installations from foreign espionage and sabotage."

More than three years later, in *United States* v. *United States District Court*, 407 U.S. 297 (1972), the Court clearly acknowledged the distinct nature of national-security wiretaps in light of "[t]he covertness and complexity of potential unlawful conduct against the Government" (*id.* at 311–312) and "the necessarily broad and continuing nature of intelligence gathering" (*id.* at 320):

> Mr. Clark. That is correct.
>
> * * * * *
>
> Mr. Corman. * * *
>
> Getting back to your practice as presently established, who are the primary authorities under the statute who may authorize wiretapping or eavesdropping under this bill, under the national security section?
>
> Mr. Clark. The way the section reads, it provides that the constitutional power of the President shall not be limited by this bill in the national security area. The manner in which he exercises that constitutional power, insofar as the language § 2514 is concerned, is left to him.
>
> Mr. Corman. Then there is no limitation on his power to delegate that authority, as far as this statute is concerned; is that correct?
>
> Mr. Clark. As far as this statute is concerned, yes.
>
> Mr. Corman. Are there other statutory limitations on his authority to delegate power that would be effective here?
>
> Mr. Clark. No. Since 1940, as a matter of practice, the wiretaps have been placed by the approval of the Attorney General.

Hearings on H.R. 5386 Before Subcomm. No. 5 of the House Comm. on the Judiciary, 90th Cong., 1st Sess. 288, 292 (1967).

> We recognize that domestic security surveillance may involve different policy and practical considerations from the surveillance of "ordinary crime." The gathering of security intelligence is often long range and involves the interrelation of various sources and types of information. The exact targets of such surveillance may be more difficult to identify than in surveillance operations against many types of crime specified in Title III. Often, too, the emphasis of domestic intelligence gathering is on the prevention of unlawful activity or the enhancement of the Government's preparedness for some possible future crisis or emergency. Thus, the focus of domestic surveillance may be less precise than that directed against more conventional types of crime.
>
> * * * Different standards [for national-security wiretaps] may be compatible with the Fourth Amendment if they are reasonable both in relation to the legitimate need of Government for intelligence information and the protected rights of our citizens.

Id. at 322-323. Even in holding that prior judicial approval was constitutionally required for "domestic" national-security wiretaps, the Court expressly declined to "attempt to detail the precise standards for domestic security warrants" (*id.* at 323) or to establish constitutional standards for "foreign" national-security wiretaps (*id.* at 308-309, 321-322). Although the District of Columbia Circuit later adverted to "some of the considerations which a judge should take into account in deciding whether it is reasonable to authorize installation of electronic surveillance equipment [in a foreign national-security case]," *Zweibon* v. *Mitchell*, 516 F.2d 594, 658 (D.C. Cir. 1975) (en banc; plurality opinion), cert. denied, 425 U.S. 944 (1976) (*Zweibon I*), it was not until 1978 (apart from the district court's decision in the present case) that a court first addressed the reasonableness standard specifically applicable to wiretaps in the national-security context. See *United States* v. *Humphrey*, 456 F. Supp. 51 (E.D. Va. 1978), aff'd in pertinent part *sub nom. United States* v. *Truong Dinh Hung*, Nos. 78-5176, 78-5177 (4th Cir. July

17, 1980). See also *Chagnon* v. *Bell*, No. 79-1232 (D.C. Cir. Aug. 14, 1980), slip op. 25-29.[47]

The uncertain state of the law was most evident with respect to the warrant requirement for national-security wiretaps. The government, upon consideration by a succession of Presidents and Attorneys General, had long been of the view that the President had the constitutional power to authorize national-security surveillance and that a judicial warrant was not required. See Pet. App. 80a-85a; see also pages 2-3 and note 3, *supra*; Brownell, *The Public Security and Wire Tapping*, 39 Cornell L.Q. 195, 197-200 (1954); Rogers, *The Case for Wire Tapping*, 63 Yale L.J. 792, 794-797 (1954).[48] In *Katz* v. *United States*, *supra*, the Court expressly reserved decision on this question (389 U.S. at 358 n.23). In his concurring opinion, Mr. Justice White endorsed the government's view, stating that "[w]e should not require the warrant procedure and the magistrate's judgment if the President of the United States or his chief legal officer, the Attorney General, has considered the requirements of national security and authorized electronic surveillance as reasonable" (389 U.S. at 364). However, Mr. Justice Douglas' concurring opinion rejected the government's argument (*id.* at 359-360). See also *Giordano* v. *United States*, *supra*, 394 U.S. at 314-315 (Stewart, J., concurring) (issue of warrant requirement for national-security wiretaps "remains open").[49]

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[47] We also note that the reasonableness standard specifically applicable to wiretaps in traditional criminal investigations was substantially clarified by this Court in *Scott* v. *United States*, 436 U.S. 128 (1978). The Court prefaced its discussion by noting that, "[b]ecause of the necessarily ad hoc nature of any determination of reasonableness, there can be no inflexible rule of law which will decide every case." *Id.* at 139. See also *Chagnon* v. *Bell*, *supra*, slip op. 27; *Kilgore* v. *Mitchell*, No. 78-2702 (9th Cir. July 22, 1980), slip op. 7-8.

[48] Attorney General Mitchell also concluded that the existing procedures for national-security wiretaps were lawful (II J.A. 178) and, after discussions with the Solicitor General's Office and the Criminal Division of the Department of Justice, that these procedures were unaffected by the Court's decisions in *Katz* and *Alderman* (II J.A. 178-179, 180-181, 182-183).

[49] As Mr. Justice Stewart added (394 U.S. at 135), "[o]ne might suppose that all of this should be entirely clear to any careful reader of the

During the period of the Halperin wiretap, several courts sustained the government's position, holding that in national-security cases a warrant was not required under either the Fourth Amendment or Section 605 of the Federal Communications Act of 1934, 47 U.S.C. (1964 ed.) 605. See *United States* v. *Clay*, Cr. No. 67 H 94 (S.D. Tex. July 14, 1969), aff'd, 430 F.2d 165 (5th Cir. 1970), rev'd on other grounds, 403 U.S. 698 (1971); *United States* v. *O'Baugh*, 304 F. Supp. 767 (D.D.C. 1969); *United States* v. *Butenko*, 318 F. Supp. 66 (D.N.J. 1970), aff'd, 494 F.2d 593 (3d Cir.) (en banc), cert. denied, 419 U.S. 881 (1974); *United States* v. *Dellinger*, No. 69 CR 180 (N.D. Ill. Feb. 20, 1970) (I J.A. 127–134); *United States* v. *O'Neal*, No. KC-CR-1204 (D. Kan. Sept. 1, 1970) (I J.A. 135–137). The first contrary decisions were rendered during the final month of the Halperin surveillance in cases involving "domestic" security wiretaps. See *United States* v. *Smith*, 321 F. Supp. 424 (C.D. Cal. 1971), and *United States* v. *Sinclair*, 321 F. Supp. 1074 (E.D. Mich. 1971). The issue of warrantless national-security wiretaps continued to divide the lower courts, however,[50] and the question finally reached this Court—more than a year after the Halperin wiretap had been terminated—on review of the *Sinclair* decision. See *United States* v. *United States District Court*, 407 U.S. 297 (1972). Although eventually holding that a warrant was constitutionally required for domestic national-security wiretaps, the Court noted that it was addressing the issue "for the first time" (*id.* at 299) and that the question had been "left open by *Katz*" (*id.* at 309). The Court also emphasized that "[s]uccessive Presidents for more than one-quarter of a century have authorized such surveillance in varying degrees, without

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Court's opinion * * *. Perhaps so, * * * [b]ut 10 years of experience here have taught me that the most carefully written opinions are not always carefully read—even by those most directly concerned."

[50] See *United States* v. *Enten*, 388 F. Supp. 97 (D.D.C. 1971), aff'd on other grounds *sub nom*, *United States* v. *Lemonakis*, 485 F.2d 941, 961–963 (D.C. Cir. 1973), cert. denied, 415 U.S. 989 (1974); *United States* v. *Lyttle*, Cr. No. 58942–71 (D.C. Super. Ct. Jan. 12, 1972) (I J.A. 138–141).

guidance from the Congress or a definitive decision of this Court" (*id.* at 299), and that the government's contentions in support of warrantless surveillance "merit the most careful consideration" (*id.* at 319).[51]

Moreover, while resolving the warrant issue for "domestic" national-security wiretaps, the Court reserved decision on the constitutional requirements applicable in cases of "foreign" national-security surveillance. *United States* v. *United States District Court*, *supra*, 407 U.S. at 308–309, 321–322. Several courts thereafter held that a warrant was not required for any such foreign security wiretap. See *United States* v. *Butenko*, 494 F.2d 593 (3d Cir.) (en banc), cert. denied, 419 U.S. 881 (1974); *United States* v. *Brown*, 484 F.2d 418 (5th Cir. 1973), cert. denied, 415 U.S. 960 (1974); see also *United States* v. *Buck*, 548 F.2d 871, 875–876 (9th Cir.), cert. denied, 434 U.S. 890 (1977). However, in 1975, the District of Columbia Circuit rejected this position in its *Zweibon I* decision, holding that a warrant must be obtained for foreign security wiretaps of domestic groups or persons who are neither agents of nor collaborators with a foreign power—the category of wiretap involved in the present case.[52]

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[51] The Court also rejected the government's contention that Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. 2510 *et seq.*) recognized and affirmed the President's inherent authority to conduct warrantless national-security wiretaps (407 U.S. at 301–308). Petitioner Mitchell had relied in part on the government's interpretation of Title III in concluding that such warrantless wiretaps were constitutional (II J.A. 178).

[52] Prior to *Zweibon I*, the District of Columbia Circuit itself had recognized that the law in this area was unsettled. In *United States* v. *Lemonakis*, 485 F.2d 941 (D.C. Cir. 1973), cert. denied, 415 U.S. 989 (1974), the court observed that the issue of non-domestic national-security wiretaps had been "expressly reserved" in *United States* v. *United States District Court*, *supra*, and that this Court had been "at pains to differentiate this activity from" foreign-intelligence surveillance (485 F.2d at 962 & n.31). In addition, the court of appeals, referring to "foreign intelligence gathering * * * as delicate and sensitive" and affecting "fragile international relationships," acknowledged "the significant differences that exist between foreign intelligence opera-

In view of the development of the law in this area, it can scarcely be doubted that, at a minimum, the constitutional standards alleged to have been violated by the Halperin wiretap were not "clearly established" (see page 50, *supra*) during the period the wiretap was in place. And, at least in the absence of a controlling judicial resolution, "each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others." *United States* v. *Nixon*, 418 U.S. 683, 703 (1974). Since the legal principles relied on by respondents involved neither "settled, indisputable law" nor "basic, unquestioned constitutional rights" (see page 51, *supra*), petitioners were entitled to qualified immunity as a matter of law. See also *Chagnon* v. *Bell*, No. 79-1232 (D.C. Cir. Aug. 14, 1980).

Nevertheless, the court of appeals rejected petitioners' qualified-immunity claim on two grounds. First, without disputing that there was no clearly established warrant requirement for national-security wiretaps before 1972,[53] the court of appeals stated that the district court had correctly ruled that the application of the Fourth Amendment's reasonableness requirement to national-security surveillances was "established law" at the time of petitioners' actions in this case (Pet. App. 40a-41a). The district court had concluded that the 21-month duration of the wiretap on respondents' telephone was unreasonable and thus in violation of the Fourth Amendment,[54] a fact that (according to the court) petitioners Mitchell and

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tions and information, on the one hand, and that of the domestic variety, on the other" (*id.* at 963). See also *Chagnon* v. *Bell*, *supra*, slip op. 17-20.

[53] The court of appeals remanded to the district court for consideration of petitioners' qualified-immunity defense with respect to their belief that a warrant was not required for a national-security wiretap (see pages 9-10, *supra*). Because petitioners are entitled to immunity as a matter of law, we believe that the Court may appropriately consider the issue at this stage.

[54] The court of appeals applied the same reasoning in the companion cases of *Zweibon* v. *Mitchell*, 606 F.2d 1172 (D.C. Cir. 1979), petition for cert. pending, Nos. 79-881, 79-883 (filed Dec. 7, 1979), and *Smith*

Haldeman at least should have known (*id.* at 40a).[55] But neither the district court nor the court of appeals cited any preexisting decisions or statutes to support the conclusion that the length of the challenged wiretap violated "established law." This is understandable because, as discussed above (see pages 51–58, *supra*), there was literally *no* "established law" at the time concerning Fourth Amendment requirements in the context of national-security surveillance.[56] Indeed, in its 1972 decision in *United States* v. *United States District Court*, *supra*, the Court noted the distinctive nature of national-security wiretaps and indicated that the reasonableness standard of the Fourth Amendment for such surveillance is necessarily different from that applicable to ordinary criminal investigations (see pages 53–54, *supra*). And even in applying the warrant requirement to domestic national-security wiretaps, the Court declined to specify the governing constitutional standard (see page 54, *supra*). It is thus apparent that there was no "established law" to guide petitioners in the conduct of the surveillance challenged in this case.[57]

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v. *Nixon*, 606 F.2d 1183 (D.C. Cir. 1979), petition for cert. pending, No. 79–882 (filed Dec. 7, 1979), although the wiretaps in those cases were far shorter in duration (six months and three months, respectively).

[55] The district court did not attribute such knowledge to petitioners Nixon and Kissinger, who, after May 1970, were not direct recipients of the wiretap summaries (see page 5, *supra*). The court of appeals rejected their claims of qualified immunity nonetheless, holding that they must "establish their subjective good faith [at trial] as an affirmative defense" (Pet. App. 40a). These petitioners, it bears repeating, had relied on the legal opinion of the Attorney General in authorizing and executing the wiretap.

[56] The courts below also failed to distinguish between the general applicability of the Fourth Amendment reasonableness standard to national-security wiretaps and the content of the reasonableness standard in that context. See, *e.g.*, *United States* v. *Ramsey*, 431 U.S. 606, 618 n.13 (1977).

[57] Prior to 1972, national-security wiretaps averaged between 78 and 209 days in length. See *United States* v. *United States District Court*, *supra*, 407 U.S. at 325 (Douglas, J., concurring). See also *United States* v. *Truong Dinh Hung*, *supra*, slip op. 5 (national-security wiretap continued for 268 days between May 1977 and January 1978).

The court of appeals also suggested that petitioners are not entitled to qualified immunity because the district court had concluded that the wiretap was continued in "bad faith" (Pet. App. 41a). The court of appeals relied in this regard on *Wood* v. *Strickland*, 420 U.S. 308, 322 (1975), which held that the qualified immunity of a school official would be lost if "he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury * * *." See also, *e.g.*, *Gomez* v. *Toledo*, No. 79-5601 (May 27, 1980), slip op. 6. The court apparently equated the possibility that the wiretap was continued in "bad faith" with a "malicious intention to cause a deprivation of constitutional rights or other injury."[58]

There are two problems with this aspect of the court of appeals' reasoning. First, the district court did *not* hold that petitioners acted in bad faith. The court ruled instead that, although the continuation of the wiretap violated the reasonableness requirement of the Fourth Amendment, this conduct was not reckless or done with "malicious disregard of [respondents'] rights" (Pet. App. 56a).[59] It rejected petitioners' claim of qualified immunity on the ground that, "[r]egardless of intention, they violated [respondents'] basic, constitutional right * * * [and] are charged with knowledge of established law" (*id.* at 74a). Accordingly, the district court's decision in this regard does not rest on any finding of subjective malice. Because there was no clearly established law to guide petitioners' conduct, and because they did not act with malicious in-

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[58] It seems obvious, however, that petitioners could not have maliciously intended to deprive respondents of a constitutional right that at the time was not known to exist.

[59] This finding was made in connection with the district court's determination that punitive damages against petitioners would be unwarranted. Although the standards of malicious intent for punitive damages and for qualified immunity are not necessarily identical, we believe it is most unlikely that the district court would have denied punitive damages here if it had found, as the court of appeals suggested, that petitioners acted in bad faith and with a malicious intent in not terminating the wiretap in this case.

tent, petitioners were entitled to qualified immunity as a matter of law even under the standards of *Wood* v. *Strickland*. See *Baker* v. *McCollan*, *supra*, 443 U.S. at 139; *Procunier* v. *Navarette*, *supra*, 434 U.S. at 562; cf. *United States* v. *Peltier*, 422 U.S. 531, 541–542 (1975).[60]

Moreover, the precise limits of the doctrine of qualified immunity are not the same for all officials, but vary "dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based." *Scheuer* v. *Rhodes*, 416 U.S. 232, 247 (1974). It is undisputed that the scope of discretion and breadth of responsibility entrusted to the President, and to the advisors who assist and act for him, differ markedly from those of federal officials generally. The same reasons that support the conclusion that these officials are absolutely immune for their official acts (see pages 25–50, *supra*) also indicate that, if their immunity is only qualified, they should not be required to disprove allegations of "malice" in personal damages actions.

The court of appeals recognized that charges of malice can be easily made and that the necessity of a trial on such claims could seriously disrupt the President's conduct of Office (Pet. App. 47a). Moreover, the conventional doctrine of qualified immunity is entirely inadequate to safeguard the execution of presidential duties (see pages 32–37 and pages 37–38 note 34, *supra*). Because of the special functions performed by the President and the need to avoid undue interference with the responsibilities of his Office in a scheme of separated powers, the President and officials acting for him should be entitled to qualified immunity as a matter of law where their conduct did not ig-

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[60] Insofar as the Court concludes, contrary to this discussion, that the record is inadequate to determine the issue of petitioners' intent, it should remand to the district court for further proceedings. In so doing, however, we believe it would be appropriate, in view of the public policies supporting the doctrine of official immunity, for the Court to set forth the legal standards to be applied on remand. See *Butz* v. *Economou*, *supra*, 438 U.S. at 507–508.

nore or defy clearly established constitutional requirements. This application of the qualified-immunity doctrine to the President and his closest advisors would impose a judicial check on intentional misconduct without subjecting them to the possibility of a lengthy and disruptive hearing on allegations of malice that would rarely be sustainable (see Pet. App. 45a).

III. THIS COURT'S DECISION IN *UNITED STATES* v. *UNITED STATES DISTRICT COURT*, AND LOWER COURT RULINGS AMPLIFYING THAT DECISION, SHOULD NOT BE APPLIED RETROACTIVELY TO CREATE PERSONAL DAMAGES LIABILITY FOR FEDERAL OFFICERS

As discussed above (see pages 51–58, *supra*), the constitutional standards applicable to national-security wiretaps were, at the least, not clearly established during the period the Halperin wiretap was in effect. Nevertheless, the court of appeals in this case (Pet. App. 29a–32a), relying on its decision in the companion case of *Zweibon* v. *Mitchell*, 606 F.2d 1172 (D.C. Cir. 1979), petitions for cert. pending, Nos. 79–881, 79–883 (filed Dec. 7, 1979) (*Zweibon III*), ruled that petitioners are subject to personal damages liability for their involvement in this surveillance. In so holding, the court has concluded that petitioners are to be held accountable under constitutional norms that simply did not exist at the time. As the Ninth Circuit held in *Weinberg* v. *Mitchell*, 588 F.2d 275 (1978), this retroactive application of judicial decisions to impose substantive standards of conduct, in the context of a suit for monetary relief against the individual petitioners, is wholly unwarranted.

In *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106–107 (1971), this Court set out the principles governing retroactivity in civil cases:

> In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. First, the decision to be applied nonretroactively must establish a new principle of law, either by

> overruling clear past precedent on which litigants may have relied * * * or by deciding an issue of first impression whose resolution was not clearly foreshadowed * * *. Second, it has been stressed that "we must * * * weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." *Linkletter* v. *Walker*, [381 U.S.] at 629. Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity." *Cipriano* v. *City of Houma*, [395 U.S.] at 706.

Each of these factors argues in this case against retroactive application of the requirements developed by the courts long after the termination of the Halperin wiretap.

a. Judicial decisions in this area, rendered after the Halperin wiretap was concluded, presented issues of first impression and were not clearly foreshadowed by prior law. As previously demonstrated, there was at the time of this surveillance no guiding determination of the standards applicable to national-security wiretaps. In 1969, several lower courts held that the President was not required to obtain a judicial warrant for such wiretaps. In early 1971—approximately one month before the end of the Halperin wiretap—the first decisions requiring a warrant for domestic national-security surveillance were issued by district courts. In June 1972—16 months after the Halperin wiretap had been discontinued—this Court held in *United States* v. *United States District Court* that a warrant was necessary under the Fourth Amendment for domestic national-security wiretaps. In the course of its opinion, however, the Court noted that there had never been "a definitive decision of this Court" on the question (407 U.S. at 299), that the "issue * * * [was before the Court] for the first time" (*ibid.*), that "[s]uccessive Presidents for more than one-quarter of a century have authorized such surveillance in varying degrees" (*ibid.*), and

that it did "not reject * * * lightly" the government's arguments in support of warrantless national-security wiretaps (*id.* at 319).

The Court also noted the special characteristics that distinguished national-security wiretaps from those involved in criminal investigations, but it left open both the precise standards for "domestic" national-security wiretaps and the constitutional requirements for "foreign" national-security surveillance. Following *United States District Court*, several courts held that a warrant was not required in connection with any such foreign security wiretaps. See page 57, *supra*. However, in its 1975 decision in *Zweibon I*, the District of Columbia Circuit reached a different result, ruling that a warrant was constitutionally required where, as in the present case, a foreign security wiretap is placed on a domestic organization or individual who is not acting in concert with a foreign power. Finally, although *United States District Court* and *Zweibon I* had briefly referred to the general Fourth Amendment doctrine of reasonableness for national-security wiretaps, it was not until 1978 that the first court addressed the reasonableness standard specifically applicable to such surveillance.

Against this background, it is clear that *United States District Court* and related decisions involved novel issues of law whose resolution was not clearly foreshadowed. See *Weinberg* v. *Mitchell*, *supra*, 588 F.2d at 277-278. For the reasons discussed above (see pages 51-58, *supra*), the fact that "the Supreme Court in the late 1960s certainly demonstrated great concern over unrestrained warrantless wiretapping" (*Zweibon III*, *supra*, 606 F.2d at 1178) falls far short of suggesting that the courts would apply Fourth Amendment doctrines developed in the criminal law enforcement area to national-security wiretaps or that, if the doctrines were held applicable, they would be interpreted in the same way.[61] As the Ninth Circuit correctly con-

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[61] Even in the law-enforcement context, as the court of appeals itself conceded, "the Fourth Amendment's * * * reasonableness standard may vary in different situations" (Pet. App. 19a; footnote omitted).

cluded, *United States District Court* "was quite a step beyond the warrant requirements in *Katz* and other cases." *Weinberg* v. *Mitchell, supra*, 588 F.2d at 277.

The court of appeals also erred in finding that petitioners' "reliance on prior Executive practice does not bear directly on our determination, since Executive actions cannot represent an authoritative source of constitutional standards" (*Zweibon III, supra*, 606 F.2d at 1179 n.36). To the contrary, "[i]n the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others." *United States* v. *Nixon, supra*, 418 U.S. at 703. See also *Lemon* v. *Kurtzman*, 411 U.S. 192, 207 (1973) (plurality opinion) ("governments must act [even in the absence of an authoritative judicial decision] if they are to fulfill their high responsibilities"). Similarly, the court of appeals' determination that petitioners were not entitled to rely on lower-court decisions upholding warrantless national-security wiretaps (*Zweibon III, supra*, 606 F.2d at 1179 n.36) is entirely unfounded.

> [U]nless we are to hold that parties may not reasonably rely upon any legal pronouncement emanating from sources other than this Court, we cannot regard as blameworthy those parties who conform their conduct to the prevailing statutory or constitutional norm. Cf. *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971); *Lemon* v. *Kurtzman*, 411 U.S. 192 (1973).

United States v. *Peltier*, 422 U.S. 531, 542 (1975) (footnote omitted). See also *Procunier* v. *Navarette, supra*, 434 U.S. at 565; *Lemon* v. *Kurtzman, supra*, 411 U.S. at 206; *Chevron Oil Co.* v. *Huson, supra*, 404 U.S. at 107;

See, *e.g.*, *Marshall* v. *Barlow's, Inc.* 436 U.S. 307, 320–321 (1978); *United States* v. *Ramsey*, 431 U.S. 606, 619 (1977); *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 554–555 (1976); *Terry* v. *Ohio*, 392 U.S. 1, 20–21 (1968).

Kilgore v. *Mitchell*, No. 78-2702 (9th Cir. July 22, 1980), slip op. 5.[62]

b. Retroactivity also will not further the purpose of these intervening constitutional standards. See, *e.g.*, *Lemon* v. *Kurtzman*, *supra*, 411 U.S. at 201-203. As the Court explained in *United States* v. *United States District Court*, *supra*, 407 U.S. at 315, 317, the rules governing national-security wiretaps are designed to protect "the needs of citizens for privacy and free expression" and to avoid "potential invasions of privacy and protected speech." Through these requirements, courts have sought to provide "reassurance of the public generally that indiscriminate wiretapping and bugging of law-abiding citizens cannot occur" (*id.* at 321). Thus, these decisions "look[] to a *future* free from such surveillance." *Weinberg* v. *Mitchell*, *supra*, 588 F.2d at 278 (emphasis added). While it may be true, as the court of appeals observed (*Zweibon III*, *supra*, 606 F.2d at 1179, 1180 & n.41), that compensation for past wrongs is the underlying rationale for the cause of action recognized in *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971),[63] that does not suggest in any way that the preventive purpose of *United States District Court* and subsequent decisions such as *Zweibon I* would be promoted by retroactive application in the present case. See *United States* v. *Peltier*, *supra*, 422 U.S. at 535, 538.[64]

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[62] Indeed, in holding that petitioners were subject to liability for the failure to obtain a warrant, the court of appeals itself relied on a lower-court decision—*Zweibon I*—that has never been approved by this Court.

[63] See also *Carlson* v. *Green*, No. 78-1261 (Apr. 22, 1980), slip op. 6; *Butz* v. *Economou*, 438 U.S. 478, 505 (1978). We note that *Bivens* was decided after the Halperin wiretap had been terminated.

[64] In our view, a different retroactivity question would be presented if, as occurred in this case (see note 14, *supra*), a plaintiff requested relief other than monetary damages. For example, if a plaintiff sought equitable relief ordering the destruction of records obtained from a warrantless wiretap, it is at least arguable that retroactivity would promote the purpose of the judicially-recognized warrant requirement

c. Perhaps most important, it would be seriously inequitable to subject petitioners, by means of a retroactive application of the law, to personal damages liability for failing to conform to constitutional guidelines that did not then exist. In cases involving civil as well as criminal liability, "the notion that persons have a right to fair warning of that conduct that will give rise to * * * [liability] is fundamental to our concept of constitutional liberty." *Marks* v. *United States*, 430 U.S. 188, 191–192 (1977). See also *Lemon* v. *Kurtzman*, *supra*, 411 U.S. at 199; *Bouie* v. *City of Columbia*, 378 U.S. 347, 352–353 (1964). For this reason, retroactivity should especially be avoided where, as here, it would "reach back to disturb or to attach legal consequence to patterns of conduct premised [on existing legal standards]" and would upset the "reliance interests founded upon the old [rule of law]" (411 U.S. at 198). See also *Bradley* v. *School Board of the City of Richmond*, 416 U.S. 696, 720–721 (1974).[65] As early as *United States* v. *Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801) (Marshall, C.J.), this Court "implored the courts to 'struggle hard against a construction which will, by a retrospective operation, affect the rights of parties.' " *Bradley* v. *School Board of the City of Richmond*, *supra*, 416 U.S. at 717, quoting 5 U.S. (1 Cranch) at 110. In light of these principles, the retroactive creation of a constitutional tort action and the imposition on petitioners of personal liability for conduct that was not wrongful at the time, as the court of appeals has done, "would be as inequitable as *ex post facto* criminal liability * * * [and]

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by eliminating any continuing effect on plaintiff's privacy. But where damages are at issue, we do not believe that retroactivity would foster the values to be served by the constitutional standard.

[65] The court of appeals acknowledged that a holding of retroactivity could not be premised here on the notion that "the standards for tort liability probably have little impact on actual conduct." As the court noted, "the standards of the Fourth Amendment were considered [by petitioners], though perhaps incorrectly gauged, in establishing the Government's policy on national security wiretaps" (*Zweibon III*, *supra*, 606 F.2d at 1180).

would be nothing short of punitive." *Weinberg* v. *Mitchell, supra*, 588 F.2d at 278. See also *Kilgore* v. *Mitchell*, No. 78-2702 (9th Cir. July 22, 1980), slip op. 9; *Morales* v. *Hamilton*, 391 F. Supp. 85, 88 (D. Ariz. 1975).

The court of appeals sought to avoid this consideration by noting that "the qualified immunity available to [petitioners for reasonable actions taken in good faith] ensures that no such inequitable result can occur." *Zweibon III, supra*, 606 F.2d at 1181; see also *id.* at 1179 n.38. The court therefore viewed the doctrine of nonretroactivity as "redundant" in light of petitioners' affirmative defense of qualified immunity (*id.* at 1181). But this reasoning overlooks the substantial and fundamental differences between the two concepts. To begin with, nonretroactivity rests on the view that "we cannot regard as blameworthy those parties who conform their conduct to the prevailing * * * constitutional norm. Cf. *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971); *Lemon* v. *Kurtzman*, 411 U.S. 192 (1973)." *United States* v. *Peltier, supra*, 422 U.S. at 542. It is a far different matter for the law to exonerate high-ranking federal officials as not blameworthy than to hold that they committed a constitutional tort but are excused from personal liability because their wrongful acts were taken in good faith.

In addition, the doctrine of retroactivity better serves to avoid the unfairness and hardship of burdensome proceedings and unjustified monetary damages. For example, the issue of retroactivity presents a legal question that would be decided by the judge rather than by lay jurors and would be resolved at a pretrial stage without the need for extensive discovery or a trial. In contrast, as the court of appeals explained (Pet. App. 38a-40a), the issue of qualified immunity would generally have to be submitted to the jury at trial, thus subjecting the defendant official to the full onus of litigation and the risk of an erroneous or unprincipled jury decision. Similarly, disposition of these and like cases on the ground of nonretroactivity would promote the development of a coherent and systematic body of law, including appellate review, in a way that is

not possible with respect to jury verdicts on the question of qualified immunity. For these reasons, the court of appeals erred in rejecting the principle of nonretroactivity and relying exclusively on the affirmative defense of qualified immunity to avert the inequity and injustice of personal damages actions against federal officials based on conduct that was not wrongful at the time it occurred.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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